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THE MISCELLANEOUS REPORTS.

CASES DECIDED

IN THE

COURTS OF RECORD

OF THE

STATE OF NEW YORK

OTHER THAN THE

Court of Appeals and the Appellate Division of the Supreme Court,

INCLUDING THE APPELLATE TERM OF THE SUPREME COURT FOR THE HEARING OF APPEALS FROM THE CITY COURT OF THE CITY OF NEW YORK AND THE MUNICIPAL COURT OF THE CITY OF NEW YORK; SPECIAL TERMS AND TRIAL TERMS OF THE SUPREME COURT, CITY COURT OF THE CITY OF NEW YORK, COUNTY COURTS AND OF THE SURROGATES' COURTS, IN PURSUANCE OF LAWS OF 1892, CHAPTER 593.

ROBERT G. SCHERER, REPORTER.

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* Appointed September 16, 1897, vice John Sedgwick, deceased.
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CASES REPORTED IN THIS SERIES WHICH HAVE BEEN AFFIRMED OR REVISED.

	Vol.	Page.
American Preservers' Co. v. Columbia Investment Co.....	11	126
Affirmed: 155 N. Y. 639.		
Brady v. Hutkoff	13	515
Affirmed: 155 N. Y. 681.		
Bristor v. Kretz	22	55
Affirmed: 29 App. Div. 624.		
Brown v. Dennison	22	59
Reversed: 28 App. Div. 535.		
Buffalo German Ins. Co. v. Third National Bank.....	19	564
Affirmed: 29 App. Div. 137.		
Burke v. Tindale	12	31
Affirmed: 155 N. Y. 673.		
Burnell v. Coles	23	260
Reversed: 23 Misc. Rep. 615.		
Caponigri v. Altieri	22	101
Reversed: 29 App. Div. 304.		
Cassidy v. Atlantic Ave. R. R. Co.	12	648
Affirmed: 155 N. Y. 691.		
Church v. Montgomery	11	716
Affirmed: 155 N. Y. 670.		
Clason v. Nassau Ferry Co.	20	315
Affirmed: 27 App. Div. 621.		
Corcoran v. N. Y. C. & H. R. R. R. Co.	20	197
Affirmed: 25 App. Div. 479.		
Damuth v. Lee	20	439
Affirmed: 29 App. Div. 26.		
Delmage v. Crow	22	511
Reversed: 23 Misc. Rep. 326.		
Denike v. Denike	8	604
Affirmed: 155 N. Y. 671.		
Eichbold v. Tiffany	21	627
Reversed: 28 App. Div. 60.		
Erickson v. Brooklyn Heights R. R. Co.	11	662
Affirmed: 155 N. Y. 643.		
Flicker v. Grauer	22	764
Affirmed: 23 Misc. Rep. 112.		
French v. Merrill	21	722
Reversed: 27 App. Div. 612.		
Gleason v. Dalton	23	18
Reversed: 28 App. Div. 555.		
Green v. Northern Steamship Co.	11	717
Affirmed: 155 N. Y. 689.		

Digitized by Google

	Vol.	Page.
Griffin v. Barton	22	228
Affirmed: 27 App. Div. 632.		
Hall v. Beston	16	528
Affirmed: 26 App. Div. 105.		
Hand v. Shaw	21	313
Reversed: 27 App. Div. 107.		
Heagney v. Hopkins	22	549
Reversed: 23 Misc. Rep. 608.		
Henriques v. Osborn Memorial Home	22	653
Affirmed: 28 App. Div. 625.		
Henriques v. Yale University	22	653
Affirmed: 28 App. Div. 354.		
Higgins v. Eagleton	13	223
Reversed: 155 N. Y. 466.		
Higgins v. Western Union Telegraph Co.	11	32
Reversed: 156 N. Y. 75.		
Hoadley v. Dumois	11	52
Affirmed: 155 N. Y. 630.		
Hobbs v. Edgar	22	510
Affirmed: 23 Misc. Rep. 618.		
Hospital Supply Co. v. O'Neill	10	655
Affirmed: 155 N. Y. 634.		
Jennings v. New York, New Haven & Hartford R. R. Co.	12	408
Affirmed: 155 N. Y. 672.		
Jeremiah v. Pitcher	20	513
Judgment so far as appealed from by plaintiff reversed; judgment on defendant's appeal affirmed: 26 App. Div. 402.		
Kamermann v. Eisner & Mendelson Co.	22	554
Affirmed: 23 Misc. Rep. 331.		
Karstens v. Karstens	20	247
Affirmed: 29 App. Div. 229.		
Kerley v. Mayer	10	718
Affirmed: 155 N. Y. 636.		
Kirkman v. Kirkman	20	211
Affirmed: 26 App. Div. 395.		
Knickerbocker Ice Co. v. Theiss	22	767
Reversed: 23 Misc. Rep. 625.		
Koehler & Co. v. Reinheimer	20	62
Reversed: 26 App. Div. 1.		
Kraetzer v. Thomas	22	557
Affirmed: 23 Misc. Rep. 329.		
Kunzman v. New York & Rockaway Beach R. Co.	11	718
Affirmed: 155 N. Y. 643.		
Lazarus v. Sands	12	575
Affirmed: 155 N. Y. 678.		
McDugan v. New York Central & H. R. R. R. Co.	11	728
Affirmed: 155 N. Y. 631.		

Digitized by Google

	Vol.	Page.
McLarney v. Long Island R. R. Co.	11	64
Affirmed: 155 N. Y. 642.		
McNamara v. Brooklyn City R. R. Co.	11	667
Affirmed: 155 N. Y. 669.		
Malloy v. New York Real Estate Assn.	13	496
Reversed: 156 N. Y. 205.		
Matter of Mills	22	629
Affirmed: 28 App. Div. 258.		
Mead v. New York El. R. R. Co.	12	646
Affirmed: 155 N. Y. 688.		
Neill v. Brooklyn El. R. R. Co.	13	403
Affirmed: 155 N. Y. 680.		
O'Hara v. Third Avenue R. R. Co.	11	708
Affirmed: 155 N. Y. 641.		
Paget v. Melcher	21	196
Modified: 26 App. Div. 12.		
People ex rel. Mitchell v. Sturges	21	605
Affirmed: 27 App. Div. 387.		
Perry v. Erb	22	6
Affirmed: 23 Misc. Rep. 105.		
Price v. Ga Nun	11	74
Affirmed: 155 N. Y. 670.		
Roe v. Crimmins	10	711
Affirmed: 155 N. Y. 690.		
Roos v. Laird	13	780
Affirmed: 155 N. Y. 683.		
Rosenquist v. Canary	20	46
Reversed: 27 App. Div. 30.		
Schutt v. Manhattan Railway Co.	13	772
Affirmed: 155 N. Y. 686.		
Sebald v. Mulholland	11	714
Affirmed: 155 N. Y. 455.		
Smith v. Howlett	21	386
Affirmed: 29 App. Div. 182.		
Smith v. Ingersoll-Sergeant Co.	12	5
Affirmed: 155 N. Y. 677.		
Smith v. Keteltas	22	588
Affirmed: 27 App. Div. 279.		
Solarz v. Manhattan R. Co.	11	715
Affirmed: 155 N. Y. 645.		
Stafford v. Azbell	8	316
Affirmed: 155 N. Y. 669.		
Stiefel v. Berlin	20	194
Modified and affirmed: 28 App. Div. 103.		
Stierle v. Union Railway Co.	13	134
Affirmed: 156 N. Y. 70.		
Stokes v. Stokes	11	716
Affirmed: 155 N. Y. 581.		

Digitized by Google

	Vol.	Page.
Thomas v. Risley	22	764
Affirmed: 23 Misc. Rep. 109.		
United Water Works Co. v. Omaha Water Co.	21	594
Affirmed: 29 App. Div. 630.		
Van Ingen v. Mail & Express Publishing Co.	14	326
Affirmed: 156 N. Y. 376.		
Vietor v. Nichol	20	718
Reversed: 23 Misc. Rep. 115.		
Whiting v. Saunders	22	539
Affirmed: 23 Misc. Rep. 332.		
Zerkowski v. Astor	13	507
Modified and affirmed: 156 N. Y. 393.		
Zorn v. McParland	11	555
Affirmed: 155 N. Y. 684.		

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TABLE

OF

CASES REPORTED.

A.

Page.

Aaronson v. Pennsylvania R. R. Co. 666
Abrams v. Platt 637
Ackels, Matter of 321
Adams v. Anderson 705
Adolph v. Klein 700
Alexander, Oetjen v. 761
Allen, Conroy v. 125
Alteria, Pfau v. 693
American Grocery Co., Reedy Elevator Co. v. 520, 765
American Grocery Co. v. Staten Island Rapid Transit Railroad Co. 356
Anaconda Copper Mining Co., Lewisohn Bros. v. 31
Anderson, Adams v. 705
Andrews v. North River Electric Light & Power Company, 512
Armstrong v. Kennedy 47
Arnold, Barnes v. 197
Atlantic Trust Co., Bracken v.. 579
Atlantic Trust Co. v. Powell... 289

B.

Badesch v. Congregation Brothers of Wilna 160
Bannon v. Levy 130
Barker, People ex rel. Delaware & Hudson Canal Co. v..... 188
Barker, People ex rel. New York Clearing House Building Co. v., 192
Barnard v. Fitzgerald 181
Barnes v. Arnold 197
Barrett, East River Savings Institution v. 423
Batchelor v. Hatie 119
Becker v. Laitin 756
Behrenes, Stokes v. 442
Bennett v. Kovarick 73
Bernstein v. Heinemann 464
Berry, Matter of 230
Bloomingdale, Hyde v. 728
Bondy v. Wiley 658
Boston Dental Assn., Railway Advertising Co. v. 663
Botsford, Matter of 388
Bowman Cycle Co. v. Dyer, 620, 767
Bracken v. Atlantic Trust Co.... 579
Bradley & Currier Co. v. Harrison. 241
Bradley Salt Co. v. Meinhold... 468
Brigantine Transportation Co., Strock v. 358
Broadway Ferry & Metropolitan Ave. R. Co., Kalfur v. 417
Brooklyn Heights R. R. Co., McKnight v. 527
Brooklyn Heights R. R. Co., Roddy v. 373
Brooklyn Union Publishing Co., Cady v. 409
Brown, Harris v. 769
Brown v. Sears 559
Bruns, Mayor v. 635
Brustein, Linden v. 655
Builders' League of New York, Whyte v. 385
Burke v. Educational Alliance.. 163
Burkhard v. Hagemeyer & Sons' Lumber Co. 167
Burliss, Smith v. 544
Burnell v. Coles 260, 615

C.

Cady v. Brooklyn Union Publishing Co. 409
Cameron v. New York Elevated R. R. Co. 590
Cantancarito v. Seigel-Cooper Co. 664

Digitized by Google

Page.

Carr v. National Bank & Loan Co. 368
Carrl, Kucher v. 250
Celia, Mayor v. 138
Chevra Bikur Cholim Aushe Rodof Sholem, Chevra Bnei Israel Aushe Yanova und Motal v. 367
Chevra Bnei Israel Aushe Yanova und Motal v. Chevra Bikur Cholim Aushe Rodof Sholem. 367
Churchill v. Wagner 595
City of Hudson v. Granger 401
Clapp v. Sternglanz 641
Clark v. Clark 272
Clark, Hensberry v. 37
Clark, Johnson v. 346
Clason v. Stewart 177
Clinton Metalic Paint Co. v. New York Metalic Paint Co... 66
Clokey v. International Clothing & General Supply Co. 773
Clyde, Odell v. 735
Cogan v. McCabe 739
Cohen, Porges v. 703
Cohen, Seigel v. 365
Cohn v. Marx 763
Cohoes Masonic Temple Assn., Fielding v. 52
Coles, Burnell v. 260, 615
Congregation Brothers of Wilna, Badesch v. 160
Conklin, Place v. 40
Conroy v. Allen 125
Continental Filter Co., Williamson v. 755
Continental Trust Co., Dickinson v. 489
Cooke, Geelan v. 460
Cornelius, Matter of 434
Cowan v. Cowan 754
Cox, Mulligan v. 696
Crow, Delmage v. 326
Crow, New York Cab Co. v.... 340
Cullen v. Cullen 80
Cutler, Matter of 508

D.

Dalton, Gleason v. 18
Dalton, People ex rel. Bowers v., 294
Damrosch, Margulies v. 77
Daniels v. Southard 235
Darcey v. Steger 145
Davidson, Finkel v. 764
Dearing, Lasche v. 722
Delmage v. Crow 326
Denehey v. McCloud 248
Dewey, People v. 267
Dickinson v. Continental Trust Co. 489

Page.

Divver, Pearse v. 691
Dohrman, Stahl v. 461
Doran, Silverman v. 96
Doty v. Village of Port Jervis.. 313
Doyle v. Kimball 431
Duffie, Wright v. 338
Dunlap v. Gill 418
Dunn, Terhune v. 600
Dyer, Bowman Cycle Co. v., 620, 767

E.

Eagle, Hardy v. 441
East River Savings Institution v. Barrett 423
Eastern Brewing Co. v. Feist.. 164
Eberlin, St. John v. 585
Edgar, Hobbs v. 618
Educational Alliance, Burke v.. 163
Eisner & Mendelson Co., Kamermann v. 330
Ellis v. Seaman 758
Erb, Perry v. 105

F.

Farrell v. New York Steam Co.. 726
Feist, Eastern Brewing Co. v... 164
Feist, Randolph v. 650
Feldman v. O'Brien 341
Fidelity Loan, Trust & Guaranty Co., Matter of 211
Fielding v. Cohoes Masonic Temple Assn. 52
Finck, Gentles v. 153
Finer, Kulla v. 470
Finkel v. Davidson 764
Fitzgerald, Barnard v. 181
Flaxman, Weinstein v. 702
Flicker v. Graner 112
Fortunato v. Mayor 82
Fosdick, Regan v. 623
Freeman, Matter of 752
French v. Society of Select Guardians. 86
Freund v. Kearney 685
Friedlander, Popkin v. 475
Friedman, Sternback v. 173
Friend, Matter of 300

G.

Gabriel v. Sicilian Asphalt Paving Co. 534
Galligan, Tuttle v. 457
Garrett v. Wood 7
Gedney, Hoeflin v. 518
Geelan v. Cooke 460
Gentles v. Finck 153
Gill, Dunlap v. 418
Gillman, Manhattan Brass Co. v. 598
Gleason v. Dalton 18
Goldberg v. Mittler 116
Goldfeder v. Lincoln 760

Digitized by Google

Page.

Goldsmith, Spaulding v. 765
Graner, Flicker v. 112
Granger, City of Hudson v..... 401
Gray, Halbran v. 771
Gray, People ex rel. Brymer v.. 602

H.

Hagemeyer & Sons' Lumber Co., Burkhard v. 167
Haines v. Kinderhook & Hudson Ry. Co. 605
Halbran v. Gray 771
Hall, People v. 479
Hanschell v. Swan 304
Hardcastle v. Hine 772
Hardenbrook, Matter of 538
Hardy v. Eagle 441
Hardy v. Knickerbocker Trust Co. 503
Harris v. Brown 769
Harrison, Bradley & Currier Co. v. 241
Hartog, Smith v. 353
Hartwig, Sather Banking Co. v., 89
Harway, Nimmo v. 126
Hatie, Batchelor v. 119
Hazard, People ex rel. Langworthy v. 477
Heagney v. Hopkins 609
Heath, Wilson v. 714
Heine, Hardcastle v. 772
Heinemann, Bernstein v. 464
Hensberry v. Clark 37
Hepner v. Maybury 262
Herrman, Zinsser v. 645, 772
Hilman, Walcott v. 459
Hip Sing Tong Society, Kee v., 769
Hirschman, Kugelman v. 773
Hobbs v. Edgar 618
Hoeflin v. Gedney 518
Hollweg, Keeler v. 415
Holm, Koppel v. 557
Holmes, Booth & Haydens, McGill v. 524
Hopkins, Heagney v. 609
Hough Cash Recorder Co. v. Mowry. 233
Hull, People ex rel. Larkin v... 63
Hyde v. Bloomingdale 728

I.

International Clothing & General Supply Co., Clokey v. 773

J.

Johnson v. Clark 346

K.

Kaffeman v. Stern 599
Kalfur v. Broadway Ferry & Metropolitan Ave. R. Co. 417

Page.

Kamermann v. Eisner & Mendelson Co. 330
Kearney, Freund v. 685
Kee v. Hip Sing Tong Society.. 769
Keeler v. Hollweg 415
Kellina, People v. 134
Kelly v. Theiss 768, 773
Kemff v. Martin 771
Kennedy, Armstrong v. 47
Kenny, Matter of 9
Kimball, Doyle v. 431
Kinderhook & Hudson Ry. Co., Haines v. 605
Klein, Adolph v. 700
Knickerbocker Ice Co. v. Theiss, 625
Knickerbocker Trust Co., Hardy v. 503
Koppel v. Holm 557
Kovarick, Bennett v. 73
Kraetzer v. Thomas 329
Kress v. Woehrle 472
Kucher v. Carrl 250
Kugelman v. Hirschman 773
Kulla v. Finer 470
Kurminsky, People v. 504
Kurzman v. Lowy 380

L.

La Grange, Penniman v. ...121, 653
Laitin, Becker v. 756
Lane, Southack v. 515
Lasche v. Dearing 722
Laskaropulos, Levene v. 759
Lavanburg v. Pfeiffer 577
Lawyers' Surety Co. v. Reinach, 242
Lennon, Madden v.....79, 704
Leubischer, People ex rel. McDonald v. 495
Levene v. Laskaropulos 759
Levy, Bannon v. 130
Levy, Murphy v. 147
Lewis, Oneida County Bank v.. 34
Lewisohn Bros. v. Anaconda Copper Mining Co. 31
Lichtig v. Poundt 632
Lincoln, Goldfeder v. 760
Linden v. Brustein 655
Lindenborn, People v. 426
Loew, People v. 574
Lowy, Kurzman v. 380
Lyman, Matter of 710

M.

McCabe, Cogan v 739
McClosky, Seaman v. 445
McCloud, Denehey v. 248
McCusker, Matter of 446
McGill v. Holmes, Booth & Haydens. 524
McKee Land & Improvement Co. v. Swikeherd 21

Digitized by Google

	Page.
McKnight v. Brooklyn Heights R. R. Co.	527
Madden v. Lennon 79,	704
Manhattan Brass Co. v. Gillman.	598
Manhattan Chess Club, People ex rel. Elwell v.	500
Manheimer, Weber v.	157
Margulies v. Damrosch	77
Martin Brown Co. v. Yardum...	762
Martin, Kemff v.	771
Martin v. Tarbox	761
Marx, Cohn v.	763
Mason v. Tietig	443
Matter of Ackels	321
Matter of Berry	230
Matter of Botsford	388
Matter of Cornelius	434
Matter of Cutler	508
Matter of Fidelity Loan, Trust & Guaranty Co.	211
Matter of Freeman	752
Matter of Friend	300
Matter of Hardenbrook	538
Matter of Kenny	9
Matter of Lyman	710
Matter of McCusker	446
Matter of Merville	398
Matter of Millar v. Weaver ...	254
Matter of Miller 319,	511
Matter of New York State Banking Co. v. Van Antwerp	38
Matter of Rembe	44
Matter of Robertson	450
Matter of Village of LeRoy.....	53
Matter of Wolfe	439
Matter of Young	223
Maybury, Hepner v.	262
Mayor v. Bruns	635
Mayor v. Celia	138
Mayor, Fortunato v.	82
Meinhold, Bradley Salt Co. v...	468
Merville, Matter of	398
Metzger v. Schnabel	696
Miller, Matter of 319,	511
Miller v. Miller Knitting Co.....	404
Miller v. Smith	648
Miller Knitting Co., Miller v...	404
Milne v. Northwestern Life Assurance Co.	553
Mittler, Goldberg v.	116
Morning Journal Association, Whiton v.	299
Morrissey, Titus Sheard Co. v..	122
Mowry, Hough Cash Recorder Co. v.	233
Mulligan v. Cox	696
Murphy v. Levy	147
Mutual Life Insurance Co. v. Robinson	563

N.

	Page.
National Bank & Loan Co., Carr v.	368
National Bank of Potsdam, St. Mary's Church v.	588
Newell, Parker v.	771
New York Cab Co. v. Crow	340
New York City Baptist Mission Society, Potter v.	671
New York City Baptist Mission Society, Ross v.	683
New York Elevated R. R. Co., Cameron v.	590
New York Mail & Newspaper Transportation Co. v. Shea....	15
New York Metalic Paint Co., Clinton Metalic Paint Co. v..	86
New York Press Co., Ullrich v.,	168
New York Steam Co., Farrell v.,	726
Nichol, Vietor v.	115
Nimmo v. Harway	126
North River Electric Light & Power Co., Andrews v.	512
Northwestern Life Assurance Co., Milne v.	553

O.

O'Brien, Feldman v.	341
Odell v. Clyde	735
Oetjen, Alexander v.	761
Oneida County Bank v. Lewis..	34
O'Neill v. Trainor	770
O'Shaughnessy, Porath v.	252
Osteyee Bros., Wisner v.	123

P.

Parker v. Newell	771
Parmenter, Wright v.	629
Patterson, Spang v.	536
Pearse v. Divver	691
Peirson v. Van Bergen	547
People v. Dewey	267
People v. Hall	479
People v. Kellina	134
People v. Kurminsky	504
People v. Lindenborn	426
People v. Loew	574
People v. Willis	568
People ex rel. Bowers v. Dalton,	294
People ex rel. Brooklyn Y. M. C. A. v. Willis	545
People ex rel. Brymer v. Gray..	602
People ex rel. Delaware & Hudson Canal Co. v. Barker	188
People ex rel. Elwell v. Manhattan Chess Club	500
People ex rel. Langworthy v. Hazard	477
People ex rel. Larkin v. Hull...	63

Digitized by Google

Page.

People ex rel. McDonald v. Leubischer 495
People ex rel. New York Clearing House Building Co. v. Barker 192
People ex rel. Swartwout v. Village of Port Jervis 317
People ex rel. United Auctioneers v. Scully 732
People ex rel. Young Men's Association v. Sayles 1
Penniman v. La Grange 121, 653
Pennsylvania R. R. Co., Aaronson v. 666
Perry v. Erb 105
Pfau v. Alteria 693
Pfeiffer, Lavanburg v. 577
Phillips, Roth v. 240
Place v. Conklin 40
Platt, Abrams v. 637
Popkin v. Friedlander 475
Porath v. O'Shaughnessy 252
Porges v. Cohen 703
Potter v. New York City Baptist Mission Society 671
Poundt, Lichtig v. 632
Powell, Atlantic Trust Co. v.... 289
Presas, Sheridan v. 757

R.

Railway Advertising Co. v. Boston Dental Assn. 663
Randolph v. Feist 650
Reedy Elevator Co. v. American Grocery Co. 520, 765
Regan v. Fosdick 623
Reinach, Lawyers' Surety Co. v., 242
Rembe, Matter of 44
Rice, Stein v. 348
Risley, Thomas v. 109
Robertson, Matter of 450
Robertson v. United Brotherhood of Carpenters and Joiners. 142
Robinson, Mutual Life Insurance Co. v. 563
Roddy v. Brooklyn Heights R. R. Co. 373
Ross v. New York City Baptist Mission Society 683
Roth v. Phillips 240

S.

St. John v. Eberlin 585
St. Mary's Church v. Nat. Bank of Potsdam 588
St. Vincent's Hospital, Ward v., 91
Sather Banking Co. v. Hartwig, 89
Saunders, Whiting v. 332
Sayles, People ex rel. Young Men's Assn. v. 1

Page.

Schendel, Schwartz v. 473, 476
Schnabel, Metzger v. 698
Schneider, Trenkmann v. 336
Schwartz v. Schendel 473, 476
Scully, People ex rel. United Auctioneers v. 732
Seaman, Ellis v. 758
Seaman v. McClosky 445
Sears, Brown v. 559
Shanks v. Stumpf 264
Shasley, Town of Wheatfield v., 100
Shea, New York Mail & Newspaper Transportation Co. v... 15
Sheridan v. Presas 757
Sicilian Asphalt Paving Co., Gabriel v. 534
Sicker v. Sicker 737
Siegel v. Cohen 365
Siegel-Cooper Co., Cantancarito v. 664
Siegel-Cooper Co., Sipp v. 141
Silverman v. Doran 96
Silverman, Starr v. 151
Sipp v. Siegel-Cooper Co. 141
Smith v. Burliss 544
Smith v. Hartog 353
Smith, Miller v. 648
Societa Italiano, etc., Tenesei v. 758, 763
Society of Select Guardians, French v. 86
Southack v. Lane 515
Southard, Daniels v. 235
Spang v. Patterson 536
Spaulding v. Goldsmith 765
Stahl v. Dohrman 461
Starr v. Silverman 151
Staten Island Rapid Transit Railroad Co., American Grocery Co. v. 356
Steger, Darcey v. 145
Stein v. Rice 348
Stern, Kaffeman v. 599
Sternback v. Friedman 173
Sternglanz, Clapp v. 641
Stewart, Clason v 177
Stokes v. Behrenes 442
Strock v. Brigantine Transportation Co. 358
Stumpf, Shanks v. 264
Swan, Hanschell v. 304
Swikehard, McKee Land & Improvement Co. v. 21

T.

Talbot v. Tipperary Men National, Social & Benefit Association 486
Tarbox, Martin v. 761
Tenesei v. Societa Italiano, etc., 758, 763

Digitized by Google

	Page.
Terhune v. Dunn	600
Theiss, Kelly v.	768, 773
Theiss, Knickerbocker Ice Co. v.,	625
Thomas, Kraetzer v.	329
Thomas v. Risley	109
Thornall v. Turner	363
Tietig, Mason v.	443
Tipperary Men National, Social & Benefit Association, Talbot v.	486
Titus Sheard Co. v. Morrissey	122
Town of Wheatfield v. Shasley	100
Trainor, O'Neill v.	770
Trenkmann v. Schneider	336
Turner, Thornall v.	363
Tuttle v. Galligan	457

U.

Ullrich v. New York Press Co	168
United Brotherhood of Carpenters and Joiners, Robertson v.,	142

V.

Van Antwerp, Matter of New York State Banking Co. v.	38
Van Bergen, Peirson v.	547
Vietor v. Nichol	115
Village of Leroy, Matter of	53
Village of Port Jervis, Doty v.	313
Village of Port Jervis, People ex rel. Swartwout v.	317
Vogel v. Weissmann	256

W.

Wagner, Churchill v.	595
Walcott v. Hilman	459
Ward v. St. Vincent's Hospital,	91
Weaver, Matter of Millar v.	254
Weber v. Manheimer	157
Weinstein v. Flaxman	702
Weissmann, Vogel v.	256
Whiting v. Saunders	332
Whiton v. Morning Journal Association.	299
Whyte v. Builders' League of New York	385
Wiley v. Bondy	658
Williamson v. Continental Filter Co.	755
Willis, People v.	568
Willis, People ex rel. Brooklyn Y. M. C. A. v.	545
Wilson v. Heath	714
Wisner v. Osteyee Bros.	123
Woehrle, Kress v.	472
Wolfe, Matter of	439
Wood, Garrett v.	7
Wright v. Duffie	338
Wright v. Parmenter	629

Y.

Yardum, Martin Brown Co. v.	762
Young, Matter of	223

Z.

Zinsser v. Herrman	645, 772

Digitized by Google

TABLE OF CASES CITED.

A.

		Page.
Abbott-Downing Co. v. Faber	87 Hun, 299	617
Acker v. Leland	109 N. Y. 5	717
Ackerman v. Emott	4 Barb. 626	219
Ackley v. Parmenter	98 N. Y. 425	106
Adams v. City of Cohoes	127 N. Y. 175	118
Agee v. Dement	1 Humph. 332	680
Alamango v. Supervisors of Albany County	25 Hun, 551	315
Allen v. Commissioners	38 N. Y. 312	450
Allen v. Godfrey	44 N. Y. 433	270
Allis v. Wheeler	56 N. Y. 50	597
Allison v. Snider Preserve Co.	20 Misc. Rep. 367	679
Allison Bros. Co. v. Allison	144 N. Y. 22	175
Altrock v. Vandenburgh	54 N. Y. St. Repr. 326	738
American Credit & Ind. Co. v. Bondy	17 App. Div. 328	621
Anderson v. Blood	152 N. Y. 285	729
Anderson v. Sibley	28 Hun, 18	630
Anheuser-Busch Brewing Co. v. Piza	24 Fed. Repr. 149	535
Anonymous	60 N. Y. 262	411
Apollinnaris Co. v. Venable	10 N. Y. Supp. 469	617
Archer v. O'Brien	7 Hun, 146	729
Asendorf v. Meyer	8 Daly, 278	407
Ashner v. Abenheim	19 Misc. Rep. 288	335
Atherton v. Atherton	155 N. Y. 129	269
Attorney-General v. R. R. Cos.	35 Wis. 429; affirmed, 94 U. S. 164	207
Auburn, etc., Bank v. Fitch	48 Barb. 344	729
Austin v. Munro	47 N. Y. 362	246, 310
Avery v. Equitable, etc., Soc.	117 N. Y. 451	175

B.

Backus v. Shipherd	11 Wend. 629	111
Bacon v. Comstock	11 How. Pr. 197	628
Bacon v. Perforated W. P. Co.	22 Misc. Rep. 592	128
Bailey v. Rome, W. & O. R. R. Co.	139 N. Y. 302	530
Baird v. Helfer	42 N. Y. Supp. 484	49
Baird v. Mayor	74 N. Y. 382; 96 id. 567	20, 86, 450
Baker v. Thomas	12 Misc. Rep. 432	344
Baldwin v. Humphrey	44 N. Y. 616	550, 738
Baldwin v. Short	25 N. Y. 553	731
Baltimore & Potomac R. R. Co. v. Fifth Bap. Church	108 U. S. 317	727
Bamberger v. Kahn	6 N. Y. St. Repr. 707	537
Bank of Republic v. Millard	10 Wall. 152	209
Bank of Rochester v. Jones	4 N. Y. 497	90
Banning v. Gunn	4 Dem. 337	286
Barnett v. Selling	70 N. Y. 492	91
Barrett v. Weber	125 N. Y. 18	175
Barth v. Amberg	9 N. Y. St. Repr. 522	628
Barth v. Backus	140 N. Y. 230	733

Digitized by Google

		Page.
Bassell v. Elmore	48 N. Y. 561	411
Bates v. Clark	95 U. S. 204	584
Bates v. Conkling	10 Wend. 389	354
Baum v. Clause	5 Hill, 199	169
Becker v. Koch	104 N. Y. 394	730
Beekman v. Bonsor	23 N. Y. 298	282
Beels v. Flynn	26 Am. St. Rep. 351	729
Bell v. Merrifield	109 N. Y. 202	269
Beman v. Todd	124 N. Y. 114	79
Benedict v. Arnoux	154 N. Y. 715	177
Bennet v. Fuller	4 Johns. 486	544
Bennett v. Bennett	Deady, 299	270
Bennett v. Leeds Mfg. Co.	110 N. Y. 150	38
Bennett v. Lockwood	20 Wend. 223	581
Benton v. Trustees of Boston City Hospital	140 Mass. 13	315
Benzing v. Steinway	101 N. Y. 547	533
Berg v. Parsons	35 N. Y. Supp. 782	652
Berman v. Goldsand	22 Misc. Rep. 735	689
Bienenstok v. Ammidown	155 N. Y. 60	177
Billings v. Russell	101 N. Y. 226	728
Bingham v. Marine Nat. Bank	41 Hun, 377	247
Bissell v. Michigan R. Co.	22 N. Y. 258	494
Black v. Vaughan	70 Tex. 47	731
Black v. W. St. L. & P. R. Co.	111 Ill. 351	357
Blanchard v. Hill	2 Atk. 484	72
Blennerhassett v. Sherman	105 U. S. 100	728
Bliven v. Seymour	88 N. Y. 469	282
Bloomer v. Merrill	1 Daly, 485	121
Board of Supervisors v. Bristol	58 How. Pr. 3	761
Bocock v. Cochran	32 Hun, 521	50
Boehm v. Rich	13 Daly, 62	467
Bogert v. Hertell	4 Hill, 508	247
Bohan v. Gas Light Co.	122 N. Y. 18	726
Booth v. Railroad Co.	140 N. Y. 280	727
Born v. Schrenkeisen	110 N. Y. 55	175
Bosley v. National Machine Co.	123 N. Y. 550	424
Bostwick v. Lewis	2 Day, 447	99
Bound v. T. C. R. R. Co.	50 Fed. Repr. 854	286
Bowman v. Teall	23 Wend. 306	584
Boyd v. Insurance Patrol of Philadelphia	113 Penn. St. 269	94
Boyle v. St. John	28 Hun, 454	246
Brady v. Cassidy	104 N. Y. 148	114
Bream, etc. v. Merchants' Nat. Bank,	25 N. Y. St. Repr. 283	408
Breen v. Lennon	10 App. Div. 36	80
Brewer v. Brewer	11 Hun, 147	281
Brewster v. Silliman	38 N. Y. 423	584
Brinton v. Van Cott	33 Pac. Repr. (Utah) 218	718
Brooklyn Ins. Co. v. Dutcher	97 U. S. 269	162
Brooklyn White Lead Co. v. Masury,	25 Barb. 416	71
Brower v. Brooklyn Trust Co.	50 N. Y. St. Repr. 630	407
Brown v. Maxwell	6 Hill, 592	529
Brown v. Richter	76 Hun, 472	279
Brown v. Weber	38 N. Y. 187	106
Brumskill v. James	11 N. Y. 294	628
Bryan v. Knickerbacker	1 Barb. Ch. 409	286
Buchanan v. Whitman	151 N. Y. 257	444
Buckhalter v. Second Nat. Bank	42 N. Y. 538	149
Buckland v. Gallup	105 N. Y. 453	247
Buel v. Trustees of Lockport	3 N. Y. 197	450
Buffalo Cem. Ass'n v. City of Buffalo	118 N. Y. 66	76

Digitized by Google

		Page.
Burkle v. Eckhart	3 N. Y. 132	680
Bush v. Roberts	111 N. Y. 278	729
Butler v. Butler	3 Barb. Ch. 304	745
Butler v. Johnson	111 N. Y. 204	425
Butler v. Kelsey	15 Johns. 177	270
Butler v. Kidder	87 N. Y. 99	127
Butler v. Townsend	126 N. Y. 105	533
Butler v. Trustees	92 Hun, 96	391
Butterworth v. Crawford	46 N. Y. 349	387
Buttrick v. City of Lowell	1 Allen, 172	315
Bybee v. Hageman	66 Ill. 519	688
Byrnes v. Byrnes	102 N. Y. 4	155
Byrnes v. Ladew	15 Misc. Rep. 413	40

C.

Cahill v. Russell	140 N. Y. 403	738
Cahill v. Wyand	22 Civ. Pro. 271	676
Campbell v. Mallory	22 How. Pr. 183	677
Campbell v. Spottiswoode	3 B. & S. 769	170
Campbell v. Woodworth	20 N. Y. 499	91
Cancemi v. People	16 N. Y. 128	482
Candee v. Smith	93 N. Y. 349	36
Canfield v. B. & O. Ry. Co.	93 N. Y. 532	670
Carpenter v. Manhattan Life Ins. Co.	22 Hun, 47	355
Carr v. Thompson	87 N. Y. 160	424
Carter v. Board of Education of Presbyterian Church	68 Hun, 436	456
Cassidy v. Daly	11 Week. Dig. 222	442
Caswell v. Davis	58 N. Y. 223	70
Cayuga Nat. Bank v. Daniels	47 N. Y. 631	90
Central Nat. Bank v. Lang	1 Bosw. 202	735
Chace v. Hinman	8 Wend. 452	406
Chamberlain v. Chamberlain	43 N. Y. 424	383, 454
Champlin v. Baldwin	1 Paige, 562	709
Chapman v. Morgan	2 Greene, 374	680
Chase v. Lord	77 N. Y. 1	207
Chase v. Senn	13 N. Y. Supp. 266; 36 N. Y. St. Repr. 36	162
Chaude v. Shepard	122 N. Y. 397	468
Chemical Nat. Bk. v. Bailey	12 Blatchf. (U. S. D. C.) 480	211
Cheesebrough v. Lieber	18 Misc. Rep. 459	352
Cheney v. Price	72 N. Y. St. Repr. 568	437
Chittenden v. Wurster	152 N. Y. 345, and 153 N. Y. 664,	20
Churchman v. Merritt	50 Hun, 270; 51 Hun, 375	40, 331
City of Buffalo v. Schliefer	25 Hun, 275	403
City of Portland v. City of Bangor,	65 Me. 120	13
Claflin v. Butterly	5 Duer, 327; 2 Abb. Pr. 446	628
Claflin v. Meyer	75 N. Y. 260	668
Clapp v. Astor	2 Edwards Ch. 379	228
Clark v. Child	136 Mass. 344	614
Clark v. Hougham	2 Barn. & Cress. 149	247
Clark v. Pinney	6 Cow. 297	469
Clark v. Sullivan	28 N. Y. St. Repr. 596	617
Clegg v. Cramer	32 Hun, 162	628
Close v. Clark	16 Daly, 91	164
Close v. Noye	4 Misc. Rep. 616; 58 N. Y. St. Repr. 115	207
Cochran v. Reich	91 Hun, 440	337
Cochran v. Wiechers	119 N. Y. 399	207

Digitized by Google

		Page.
Coe v. Wise	L. R., 1 Q. B. 711	94
Coffin v. Tracey	3 Cal. 129	681
Cogswell v. Railroad Co.	103 N. Y. 10	726
Cohn v. Baldwin	141 N. Y. 563	621
Cole v. Sanford	77 Hun, 199	352
Coleman v. Henderson	12 Am. Dec. 290, note	270
Coleman v. Manhattan B. I. Co.	94 N. Y. 229	688
Collins v. Hydorn	135 N. Y. 320	180
Collins v. Ragrew	15 Johns. 5	348
Collister v. Fassit	7 App. Div. 20	286
Colman v. Crump	70 N. Y. 573	73
Colonial C. T. Co. v. Kingston R. R. Co.	153 N. Y. 540; 154 id. 493..	378, 497
Colt v. Lasnier	9 Cow. 320	246
Columbia Mill Co. v. Alcorn	150 U. S. 460	71
Colwell v. Devlin	20 Misc. Rep. 355, 616..	364, 475, 702
Commerce Ex. Nat. Bank v. Blye..	123 N. Y. 132	583
Commonwealth v. Cochituate Bank,	3 Allen, 42	208
Commonwealth v. Union League Club	135 Penn. St. 301	502
Commonwealth v. Vrooman	164 Penn. St. 306	576
Conaughty v. Nichols	42 N. Y. 83	889
Concord Granite Co. v. French	65 How. Pr. 317	35
Conkey v. Bond	36 N. Y. 427	372
Conselyea v. Swift	103 N. Y. 604	337
Constable v. Hardenbergh	76 Hun, 438	622
Converse v. Kellogg	7 Barb. 596	282
Converse v. Sickels	16 App. Div. 49	654
Conway v. Starkweather	1 Den. 113	117
Coon v. Syracuse & U. R. R. Co.	6 Barb. 231; 5 N. Y. 492.	529
Copeland v. Luttgen	17 Misc. Rep. 604	350
Corning v. McCullough	1 N. Y. 47	207
Cotheal v. Brouwer	5 N. Y. 562	587
County of Monroe v. City of Rochester	154 N. Y. 570	26
County of North Hampton v. Lafayette College	128 Penn. St. 132	6
Crabb v. Young	92 N. Y. 56	293
Crabtree v. Whiteselle	65 Tex. 111	270
Craig v. Parkis	40 N. Y. 181	111
Crawford v. Neal	144 U. S. 585	720
Cregan v. Marston	126 N. Y. 568	529, 532
Crippen v. Thompson	6 Barb. 532	406
Crispin v. Babbitt	81 N. Y. 516	532
Cristie v. Richardson	3 Term Rep. 78	614
Cromwell v. MacLean	123 N. Y. 485	76
Cronkite v. Wells	32 N. Y. 247	639
Crounse v. Fitch	1 Abb. Ct. App. Dec. 475	91
Cruikshank v. Home for Friendless,	113 N. Y. 337	707
Cudd v. Jones	63 Hun, 142	630
Cullen v. Norton	126 N. Y. 1	532
Culver v. City of Streator	130 Ill. 238	315
Curran v. City of Boston	151 Mass. 505	315
Curran v. Weiss	6 Misc. Rep. 138	459
Curtin v. Barton	139 N. Y. 505	50
Curtis v. Leavitt	15 N. Y. 9, 222	209
Curtiss v. Ayrault	47 N. Y. 73	387
Cutting v. Damerel	88 N. Y. 410	586
Daly v. Wise	132 N. Y. 306	350
Dalzell v. D. M. Co.	149 U. S. 315	719
Dammert v. Osborn	140 N. Y. 30	455

Digitized by Google

D.

		Page.
Darling v. Klock	74 Hun, 248	261, 617
Darrow v. Family Fund Society	116 N. Y. 537	410
Davidsburgh v. Knickerbocker Life Ins. Co.	90 N. Y. 526	680
Davidson v. New Orleans	96 U. S. 97	499
Davidson v. Shuler	119 N. C. 582; 26 S. E. Repr. 340,	689
Davis v. Elmira Savings Bank	161 U. S. 275	589
Davis Sewing Machine Co. v. Best,	50 Hun, 80	581
Dawson v. Horan	51 Barb. 459	51
Day v. Town of New Lots	107 N. Y. 148	625
Dean v. Cannon	1 Daly, 34	123
Decker v. Ekelman	17 Misc. Rep. 665	545
Decker v. Saltsman	1 Hun, 421; affd., 59 N. Y. 275	347
De Grove v. Insurance Co	61 N. Y. 594	450
De Freest v. Warner	30 Hun, 94	630
Delafield v. Shipman	103 N. Y. 463	281
Delaware & H. C. Co. v. Clark	13 Wall. 311	71
Demings v. Supreme Lodge	131 N. Y. 522	88
Denham v. Cornell	67 N. Y. 556	709
Deobold v. Oppermann	111 N. Y. 531	246
Derham v. Lee	87 N. Y. 599	409
Despard v. Walbridge	15 N. Y. 377	696
Dickinson v. Bush	17 Week. Dig. 17	618
Dieffenbach v. Roche	112 N. Y. 621	238
Dixon v. Buck	42 Barb. 70	91
Doctor v. Hartman	74 Ind. 221	680
Domschke v. Met. El. Ry. Co.	74 Hun, 442	593
Donovan v. Van De Mark	78 N. Y. 244	551
Douglass v. Selford	18 Misc. Rep. 188	444
Dubois v. Ray	35 N. Y. 162	742
Dudley v. Danforth	61 N. Y. 626	729
Dudley v. Mayhew	3 N. Y. 9	680
Dunham v. Griswold	100 N. Y. 224	174
Dunlap v. Glidden	31 Me. 435	99
Durell v. Mosher	8 Johns. 445	355
Dutton v. Smith	10 App. Div. 566	238
Duval v. Wellman	124 N. Y. 156	42
Dyett v. Hyman	129 N. Y. 351	90

E.

Eckford v. Eckford	26 L. R. R. 370	688
Edelsten v. Edelsten	1De Gex, J. & S. 185	73
Edson v. Bartow	10 App. Div. 104	391
Edson v. Howell	86 Hun, 424	103
Einstein v. General Electric Co.	9 App. Div. 570	261, 618
Elias v. Schweyer	13 App. Div. 336	214
Elmira Savings Bank v. Davis	142 N. Y. 590	408
Embury v. Conner	3 N. Y. 511	450
Enoch Morgan's Sons v. Troxell	89 N. Y. 292	69
Ensign v. Supervisors of Livingston County.	25 Hun, 20	315
Erie & N. Y. City R. R. Co. v. Patrick.	2 Keyes, 258	155
Erkenbrach v. Erkenbrach	96 N. Y. 456	81
Erwin v. Downs	15 N. Y. 575	736
Evans v. Conklin	71 Hun, 536	466
Everitt v. Everitt	29 N. Y. 39	281
Evertson v. Nat. Bank of Newport	66 N. Y. 14	124
Express Co. v. Caldwell	21 Wall. 264	357

Digitized by Google

F.

		Page.
Faber v. Hovey	117 Mass. 107	614
Fairchild v. Edson	154 N. Y. 199	582
Fairchild v. McMahon	139 N. Y. 290	371
Fairfax v. R. R. Co.	67 N. Y. 14	668
Farmers' L. & T. Co. v. Aberle	18 Misc. Rep. 257; S. C., 19 App. Div. 79.	88
Favill v. Roberts	50 N. Y. 222	422
Felleett v. Engler	8 Cal. 77	680
Fellows v. Longyor	9 N. Y. 324	246
Ferguson v. Crawford	70 N. Y. 254	238
Fielden v. Lahens	2 Abb. Ct. App. Dec. 111	628
Fire Ins. Co. v. Village of Keeseville	148 N. Y. 46	314
First Nat. Bank v. Fourth Nat Bank,	77 N. Y. 320	149
First Nat. Bank v. N. Y. C. & H. R. R. Co.	85 Hun, 160; 4 Am. & Eng. Ency. of L. (2d ed.) 522	90
Fischer v. Blank	138 N. Y. 244	69
Fitch v. Devlin	15 Barb. 48	238
Flash v. Conn.	109 U. S. 371	207
Fleischmann v. Schuckmann	62 How. Pr. 92	71
Ford v. Joyce	78 N. Y. 618	175
Ford v. Williams	13 N. Y. 577	90
Forman v. Whitney	2 Keyes, 165	286
Forrest v. Manchester R. Co.	4 De G., F. & J. 126	32
Fosdick v. Town of Hempstead	125 N. Y. 581	391
Fourth Nat. Bank v. Scott	31 Hun, 301	600
Fox v. Quinn	12 N. Y. Supp. 725	253
Franklin v. Brown	118 N. Y. 110	351
"Fraudulent" Singer Co. v. Wilson,	2 Ch. Div. 434	73
Frazer v. Hunt	18 Week. Dig. 390	597
Fuchs v. Cohen	19 N. Y. Supp. 36; 29 Abb. N. C. 56; 22 Civ. Pro. 269; 46 N. Y. St. Repr. 770	676
Fudickar v. Guardian M. L. I. Co.	62 N. Y. 392	502
Fuld v. Kahn	4 Misc. Rep. 600	473
Fuller v. Jewett	80 N. Y. 46	530
Fuller v. Kemp	138 N. Y. 231	360
Fullerton v. Dalton	58 Barb. 236; affd., 49 N. Y. 659,	463
Fursman v. Fannaci	2 N. Y. Supp. 339	467

G.

Galasso v. National Steamship Co.	27 App. Div. 169	531
Gall v. Gall	64 Hun, 600	717
Gamble v. Queens C. W. Co.	123 N. Y. 91	33
Gates v. N. Y. Recorder Co.	155 N. Y. 234	410
Gebhard v. N. Y. Club	21 Abb. N. C. 248	502
Geisse v. Bunce	23 App. Div. 289	743
Geraty v. Reid	78 N. Y. 64	50
Gerding v. Haskin	141 N. Y. 514	345, 694
Gibson v. Stevens	5 How. (U. S.) 384	90
Giddings v. Lea	19 S. W. Repr. 682	688
Gilbert v. Taylor	76 Hun, 92	394
Gilbert v. Wiman	1 N. Y. 550	406
Giles v. Comstock	4 N. Y. 270	352
Giles v. Loring	48 Fed. Repr. 474	312
Gill v. McNamee	42 N. Y. 45	91
Gilliland v. Sellers	2 Ohio St. 223	680
Glass v. Place	5 Daly, 110	122

Digitized by Google

		Page.
Glavin v. Rhode Is. Hospital	12 R. I. 411	94
Gleadell v. Thomson	56 N. Y. 197	670
Godine v. Kidd	64 Hun, 585	719
Goebel v. Wolf	113 N. Y. 405	281
Gooch v. Association for Relief of Aged, Indigent Females	109 Mass. 558	6
Grafton v. Brigham	70 Hun, 131	466, 680
Grant v. MacNutt	12 Misc. Rep. 20	149
Grant v. Norway	10 C. B. 665	308
Gray v. Coffin	9 Cush. 199	207
Greco v. Bernheimer	17 Misc. Rep. 592	659
Greeley v. Smith	3 W. & M. 234; Fed. Cases No. 5750.	307
Green v. Carey	81 Hun, 496	40
Greene v. Greene	125 N. Y. 512	279
Greenland v. Waddell	116 N. Y. 234	281
Greentree v. Rosenstock	61 N. Y. 583	339
Griffiths v. Morrison	106 N. Y. 165	388
Grimmett v. State	22 Tex. App. 36	484
Grossman v. Supreme Lodge	13 N. Y. St. Repr. 596	88
Grow v. Garlock	29 Hun, 600; approved in 119 N. Y. 632	566
Guest v. City of Brooklyn	69 N. Y. 506	27
Gugel v. Isaacs	21 App. Div. 503	352, 697
Gunther v. Mayer	51 N. Y. St. Repr. 538	408

H.

Haebler v. Myers	132 N. Y. 363	469
Hagmayer v. Farley	23 App. Div. 432	201, 209
Hall v. Lauderdale	46 N. Y. 74	333
Hall v. Robinson	2 N. Y. 293	354
Ham v. Mayor	70 N. Y. 459	315
Hamet v. Letcher	37 Ohio, 356	463
Hamilton v. Eno	81 N. Y. 126	169
Hancock v. Rand	94 N. Y. 8	699
Hancox v. Wall	28 Hun, 214	286
Hand v. Rogers	16 Misc. Rep. 17	628
Harding's Case	1 Greenl. (Me.) 26	674
Harlem Gas Light Co. v. Mayor	33 N. Y. 309	20
Harrington v. Higham	15 Barb. 525	628
Harris v. Hammond	18 How. Pr. 123	614
Harris v. Larkins	22 Hun, 488	550
Harris v. Oakley	130 N. Y. 5	688
Harrison v. Harrison	36 N. Y. 543	279
Hart v. R. R. Co.	67 Hun, 556	261
Hart v. Sexton	11 Misc. Rep. 446	601
Harvey v. Walker	59 Hun, 114	38
Haselton v. Colburn	1 Robt. 345	150
Hass v. Mutual Rel. Ass'n	49 Pac. Repr. 1056	88
Haullenbeck v. Gillies	7 Abb. Pr. 421	123
Hawthorne v. Coursen	18 Misc. Rep. 447	468
Hayes v. Ward	4 Johns. Ch. 123	416
Haynes v. Aldrich	133 N. Y. 287	118
Haynes v. Sherman	117 N. Y. 433	281
Heacock v. Sherman	14 Wend. 59	434
Heath v. Heath	18 Misc. Rep. 521	718
Hecht v. Mothner	4 Misc. Rep. 536	459
Hellenberg v. District No. 1	94 N. Y. 580	88, 161

Digitized by Google

		Page.
Hemmens v. Nelson	138 N. Y. 517	412
Henderson v. Henderson	113 N. Y. 15	279
Hendricks v. Hendricks	3 App. Div. 604	510
Heney v. Mead	4 L. B. 10	618
Hennessy v. Woolworth	128 U. S. 438	719
Henry v. Allen	151 N. Y. 1	177
Henry v. Root	33 N. Y. 526	630
Herman v. McKinney	47 Fed. Repr. 758	731
Herring v. Hoppock	15 N. Y. 409	90
Hersee v. Simpson	154 N. Y. 496	742
Herter v. Mullen	9 App. Div. 593	118
Hetzel v. Barber	69 N. Y. 1	696
Hibbard v. Stewart	1 Hilt. 207	584
Hickey v. Taaffe	99 N. Y. 204 546,	724
Hicks-Alixanian v. Walton	14 App. Div. 199	337
Hier v. Abrahams	82 N. Y. 519....70,	73
Higgins v. Crouse	147 N. Y. 411	426
Higgins v. Whitson	20 Barb. 141	293
Hildeburn's Estate	16 Co. Ct. Rep. 39	456
Hillyer v. Vandewater	31 N. Y. St. Repr. 671	283
Hilton v. Fonda	86 N. Y. 339	450
Hine v. Bowe	114 N. Y. 350	729
Hirshberg v. Dinsmore	12 Daly, 429	357
Hirshfeld v. Bopp	145 N. Y. 84	200
Hirshfeld v. Kursheedt	81 Hun, 560	208
Hoag v. Hoag	35 N. Y. 469	696
Hobson v. Hale	95 N. Y. 598	542
Hoffeld v. City of Buffalo	130 N. Y. 387	27
Hogan v. Devlin	2 Daly, 184	458
Hoghton v. Whitgreave	1 Jac. & W. Ch. Rep. 146	743
Holcomb v. Campbell	118 N. Y. 46	310
Holden v. Strong	116 N. Y. 471	286
Holland v. Alcock	108 N. Y. 312	391
Holland v. Taylor	111 Ind. 121	88
Holliday v. St. Leonard	11 C. B. (N. S.) 192	94
Hollis v. Drew Theological Seminary,	95 N. Y. 166	456
Holmes v. Jones	121 N. Y. 461; 147 id. 66.... 171,	266
Home Forum Ben. Order v. Jones	50 Pac. Repr. 165	88
Hood v. Hayward	124 N. Y. 1	246
Hood v. Hood	85 N. Y. 561	751
Hooper v. California	155 U. S. 648	517
Hooper v. Sage	21 N. Y. St. Repr. 491	527
Hope v. Brewer	136 N. Y. 126; id. 138.. 383, 391,	454
Hope v. People	83 N. Y. 418	572
House v. Lockwood	137 N. Y. 268	582
House v. Walch	144 N. Y. 421	162
Howell v. Adams	68 N. Y. 314	209
Howell v. Mills	53 N. Y. 322 616,	621
Hubbell v. Carpenter	5 Barb. 520	176
Hughes v. County of Monroe	147 N. Y. 49	314
Hughes v. N. Y. C. & H. R. R. Co.	36 N. Y. Supr. Ct. 222	639
Humphreys v. R. R. Co.	121 N. Y. 435	258
Hunnewell v .Shafer	30 N. Y. St. Repr. 831	519
Hunt v. Bennett	19 N. Y. 173	170
Hunt v. Hunt	72 N. Y. 217 62,	269
Hunting v. Blun	143 N. Y. 511	201
Hurd v. Tombes	7 How. (Miss.) 229	680
Hurliman v. Seckendorf	9 Misc. Rep. 264	337
Hurst v. N. Y. Produce Ex	100 N. Y. 605; 1 Cent. Repr. 265,	502

Digitized by Google

I.

		Page.
Ingersoll v. Nassau E. R. R. Co....	89 Hun, 213	379
Inglis v. Trustees Sailors' Snug Harbor.	3 Pet. 99	383
In re White	45 Fed. Repr. 237	269
Ireland v. Ireland	84 N. Y. 321	286
Ireland v. Palestine, etc., Turnpike Co.	19 Ohio, 372	208
Irving Bank v. Alley	79 N. Y. 536	736
Iseman v. Myres	26 Hun, 651	391
Ivory v. Town of Deerpark	116 N. Y. 482	105

J.

Jacks v. Moore	33 Ark. 31	680
Jackson v. Rowland	6 Wend. 666	696
Jaffee v. Jacobson	4 U. S. App. 5.....	718
Jakobi v. Gorman	2 Misc. Rep. 190.....	601
James v. Pope	19 N. Y. 324	444
Jeffries v. Harbin	20 Ala. 387	680
Jemison v. Citizens' Sav. Bank.....	85 N. Y. 546	261
Jennings v. G. T. R. Co.....	127 N. Y. 438	357
Jewett v. Noteware	30 Hun, 194	729
Jex v. Jacob	7 Abb. N. C. 452	155
Joel v. Woman's Hospital	89 Hun, 73	94
Johnson v. Barg	8 Misc. Rep. 307.....	352
Johnson v. People	55 N. Y. 512	14
Johnson v. Underhill	52 N. Y. 203	586
Jones v. Butler	83 Hun, 91	8
Jones v. Union Ry. Co.....	18 App. Div. 267.....	661
Jourdan v. Healey	46 N. Y. St. Repr. 198.....	701
Judson v. Village of Olean.....	116 N. Y. 655	533

K.

Kaempfer v. Gorman	43 N. Y. St. Repr. 800; 22 Civ. Pro. 35.	618
Kaiser v. Hoey	1 N. Y. Supp. 429.....	357
Kaiser v. Latimer	9 App. Div. 36	668
Kamp v. Kamp	59 N. Y. 212	81
Kane v. Man. Ry. Co.....	42 N. Y. St. Repr. 415.....	592
Kane v. Paul	14 Pet. 33	247
Kearney v. Cruikshank	117 N. Y. 95	228
Kearney v. Mayor	92 N. Y. 617	120
Keasbey v. Brooklyn Chemical Works.	142 N. Y. 467	70
Keavey v. De Rago	20 Misc. Rep. 105	704
Kennedy v. Hoy	105 N. Y. 134	279
Kenney v. Livery Stable Keepers' Ass'n	89 Hun, 190	470
Kenney v. Rhinelander	28 App. Div. 246	598
Kerr v. Dougherty	79 N. Y. 327	454
Kiah v. Grenier	56 N. Y. 220	551
Kilbourn v. Thompson	103 U. S. 168	498
Kilpatrick v. Barron	125 N. Y. 751	743
Kincaid v. Archibald	73 N. Y. 189	630
Kincaid v. Dinwelle	59 N. Y. 548	201
King v. Poole	36 Barb. 242	270
King v. Sarria	69 N. Y. 33	309
King v. Talbot	40 N. Y. 76	285
King v. Woodhull	3 Edw. Ch. 79	397
Kingsley v. Kingsley	79 Hun, 569	265
Kip v. Brigham	6 Johns. 158; 7 id. 168.....	406

Digitized by Google

		Page.
Kirkpatrick v. N. Y. C. & H. R. R. Co.	79 N. Y. 240	530
Kley v. Healy	9 Misc. Rep. 93	473
Knapp v. Simon	96 N. Y. 292	310
Kneering v. Lennon	3 Misc. Rep. 247; 51 N. Y. St. Repr. 907	8
Knower v. C. N. Bank	124 N. Y. 552	729
Koehler v. Farmers & Drovers' Bank	17 Civ. Pro. 307; affd., 117 N. Y. 661	16
Kofka v. Rosicky	41 Neb. 328	718
Kreizer v. Allaire	16 Misc. Rep. 6	616
Kron v. Schoonmaker	3 Barb. 647	170
Krone v. Kings Co. El. R. Co.	50 Hun, 431	17

L.

Ladenburg v. Commercial Bank	87 Hun, 269	523
Lafond v. Deems	81 N. Y. 514	502
Lake Ontario Nat. Bk. v. Judson	122 N. Y. 278	337
Lamb v. Camden, etc., R. R. Co.	46 N. Y. 272	670
Lance v. Shaughnessy	86 Hun, 414	582
Lane v. Wilcox	55 Barb. 615	173
Laney v. Rochester Ry. Co.	81 Hun, 346	565
Langley v. Wadsworth	99 N. Y. 61	159
Lanman v. Crooker	97 Ind. 163; S. C., 49 Am. Rep. 437	689
Lanpher v. Clark	149 N. Y. 472	265
Laverty v. Clausen	40 Fed. Repr. 542	310
Laverty v. Snethen	68 N. Y. 522	339
Lawrence v. Samuels	20 Misc. Rep. 279	616
Lawrence v. Wilcock	11 Ad. & Ell. 941	680
Lawton v. Sorlies	127 N. Y. 100	743
Lawton v. Steele	119 N. Y. 241	14
Lea v. Wolf	13 Abb. Pr. (N. S.) 389	71
Learned v. Tillotson	97 N. Y. 1	717
Lechmere v. Fletcher	3 Tyr. 450	631
Legate v. Legate	87 Tex. 248	269
Lego v. Medley	79 Wis. 211; S. C., 24 Am. St. Rep. 706	688
Lemieux v. English	19 Misc. Rep. 545	704
Lent v. N. Y. & M. R. Co.	130 N. Y. 504	337
Lentilhon v. Bacon	48 N. Y. St. Repr. 864; 20 N. Y. Supp. 488	261, 618
Leonard v. Giddings	9 Johns. 355	111
Leonard v. Vredenburgh	8 Johns. 29	107
Levy v. Coogan	16 Daly, 137	620
Levy v. Williams	79 Ala. 171	730
Levy's Accounting	1 Abb. N. C. 182	301
Lewis v. Few	5 Johns. 1	169
Lewis v. Great Western Ry. Co.	5 Hurl. & Norm. 867	357
Lewis v. Wilson	121 N. Y. 284	502
Lindsey v. McClelland	1 Bibb, 252	680
Lisk v. Sherman	25 Barb. 434	717
Little v. Webster	1 N. Y. Supp. 315	176
Livermore v. Bainbridge	56 N. Y. 72	616
Liverpool, etc., Steam Co. v. Phenix Ins. Co.	129 U. S. 458	309
Livingston v. New York Life Ins. & Trust Co.	36 N. Y. St. Repr. 566	552
Lloyd v. Matthews	51 N. Y. 124	620
Lockwood v. Thorne	11 N. Y. 170	341
Looney v. Hughes	26 N. Y. 514	400

Digitized by Google

		Page.
Lord v. Lindsay	18 Hun, 484	550
Losey v. Stanley	147 N. Y. 560	550
Loubat v. LeRoy	15 Abb. N. C. 1, and note; S. C., 40 Hun, 546	502
Loughlin v. State	105 N. Y. 159	532
Lovett v. Gillender	35 N. Y. 617	284
Ludlow v. Colt	3 Law Bull. 102	364
Lukens Iron & Steel Co. v. Payne	13 App. Div. 11	523
Lynes v. Hickey	4 Misc. Rep. 522	150, 164, 359
Lyon v. R. R. Co	88 Hun, 27	257

M.

McAndrew v. Bassett	10 Jur. (N. S.) 492	11
McBride v. Ellis	9 Rich. (South Car.) 313	412
McCarthy v. Hiller	26 App. Div. 588	583
McCarthy v. Noble	5 Legal Obs. 380	682
McCrea v. Bedell	9 Misc. Rep. 372; 60 N. Y. St. Repr. 616	587
McDonald v. General Hospital	120 Mass. 432	6, 94
McDonald v. North	47 Barb. 530	581
McGean v. Met. El. R. R. Co	133 N. Y. 16	35, 592
McGillis v. McGillis	11 App. Div. 359; 154 N. Y. 532	743
McGuire v. Johnson	2 Lans. 305	628
McIlehaw v. Smith	8 T. R. 86	269
McIntosh v. Ensign	28 N. Y. 169	628
McKane v. Brooklyn Citizen	53 Hun, 132	265
McKay v. Smith	39 Fed. Repr. 556	600
McKeage v. Hanover Fire Ins. Co	81 N. Y. 38	656
McKee v. DeWitt	12 App. Div. 617	257
McKensie v. Farrell	4 Bosw. 193	628
McKinnon v. McKinnon	56 Fed. Repr. (Mo.) 409	718
McLaughlin v. Harriot	14 Misc. Rep. 343	466
McMahon v. Reuhr	47 N. Y. 67	679
McPhail v. Williams	41 Fed. Repr. 61	311
McPherson v. Cox	86 N. Y. 472	174
McShane v. Howard Bank	10 L. R. A. 552	177
Madison Square Bank v. Pierce	137 N. Y. 444	35
Maitland v. Atlantic	Newb. 514	307
Malcolm v. Allen	49 N. Y. 448	407
Mallory v. Gillett	21 N. Y. 412	106
Malone v. Hathaway	64 N. Y. 5	531
Manhattan Ry. Co. v. Dunn	13 Civ. Pro. 166	253
Manice v. Manice	43 N. Y. 303	279
Manufacturers & Traders' Bank v. Love	13 App. Div. 561	40
Marchand v. Haber	16 Misc. Rep. 319	683
Maria v. Kirby	12 B. Monroe, 542	269
Marks v. Murphy	27 App. Div. 160; 50 N. Y. Supp. 622	504
Marshall v. Rochester Printing Company	35 Hun, 667	483
Martin v. Mayor	12 Abb. Pr. 243; affd. 20 How. 86; 11 Abb. Pr. 295	239
Martin v. Silliman	53 N. Y. 615	619
Mason v. Mason	4 Sandf. Ch. 623	286
Massey v. Fisher	62 Fed. Repr. 958	589
Matter of Bloomingdale	February, 1879, N. Y. Monthly Law Bulletin, vol 1	499
Matter of Bort	25 Kan. 308; 37 Am. Rep. 255	269
Matter of Bradley	141 N. Y. 527	753
Matter of Cooper	93 N. Y. 507	62, 450
Matter of Corwin	135 N. Y. 245	319

Digitized by Google

		Page.
Matter of Davis	71 N. Y. St. Repr. 181	437
Matter of Dugro	50 N. Y. 513	20
Matter of Empire City Bank	18 N. Y. 199	210
Matter of Gerry	103 N. Y. 445	510
Matter of Gilbert E. R. Co.	70 N. Y. 361	378
Matter of Globe Mut. Ben. Ass'n.	63 Hun, 263	88
Matter of Gomprecht	13 Daly, 481; affd., 102 N. Y. 741,	301
Matter of Green	37 N. J. Eq. 254	219
Matter of Hermance	71 N. Y. 481	724
Matter of Hollister Bank	23 N. Y. 508	203
Matter of Hopkins	57 Hun, 9	233
Matter of Hurlburt	89 N. Y. 259	303
Matter of Huss	126 N. Y. 537	383
Matter of Jacob	5 App. Div. 508	180
Matter of Johnson	10 Daly, 123	301
Matter of Klett's Will	3 Misc. Rep. 385	558
Matter of Lee's Bank of Buffalo	21 N. Y. 19	205
Matter of Ludeke	22 Misc. Rep. 676	301
Matter of N. Y. C. & H. R. R. R. Co.,	90 N. Y. 349	76
Matter of New York, Lackawanna & Western Railroad Co.	98 N. Y. 447	450
Matter of Prime	136 N. Y. 349	440
Matter of Rauth	10 Daly, 52	302
Matter of Rochester E. R. Co.	123 N. Y. 358	379
Matter of Searls	155 N. Y. 333	497
Matter of Sells	15 App. Div. 571	753
Matter of Shortridge	99 Cal. 531	485
Matter of Sutton	3 App. Div. 208; 149 N. Y. 618	233
Matter of Swift	137 N. Y. 77	190
Matter of Union College	129 N. Y. 308	13
Matter of Vassar	127 N. Y. 1	6, 95
Matter of Westurn	152 N. Y. 93	231
Matter of Woolsey	95 N. Y. 135	62
Matter of Zinzow	18 Misc. Rep. 653	448
Matthews v. Associated Press	136 N. Y. 333	502
Maxmilian v. Mayor	62 N. Y. 160	314
May v. N. Y. Safety Res. Fund Soc.	14 Daly, 390	88, 161
May v. Traphagen	139 N. Y. 478	76
Mayo v. Knowlton	134 N. Y. 250	372
Mayor v. Manhattan R. Co.	143 N. Y. 1	62
Mead v. Bunn	32 N. Y. 275	234
Meadow Dam Co. v. Gray	30 Me. 547	207
Meech v. Stoner	19 N. Y. 27	348
Merchants' Ins. Co. v. De Wolf	33 Penn. St. 45	614
Merrett v. Earle	31 Barb. 38	270
Merrill v. Reiners	14 Misc. Rep. 583	417
Merserau Co. v. Washburn	6 App. Div. 404	108
Mersey Docks Trustees v. Gibbs,	L. R., 1 H. L. 93	94
Metropolitan, etc., Co. v. Meeker	85 N. Y. 614	174
Meyberg v. Jacobs	40 Mo. App. 128	731
Meyer v. Hibsher	47 N. Y. 265	150
Millard v. Missouri, K. & T. R. R. Co.	86 N. Y. 441	155
Miller v. Brinkerhoff	4 Den. 119	679
Miller v. L. I. R. R. Co.	71 N. Y. 384	75
Miller v. Wood	116 N. Y. 351	425
Miller v. Woodhead	52 Hun, 127	725
Mogg v. Mogg	1 Mer. 654	748
Monnot v. Ibert	33 Barb. 26	355
Monroe v. Douglass	5 N. Y. 447	268
Montgomery v. Thompson	House of Lords, 64 Law Times (N. S.) 748	535
Moore v. Francis	121 N. Y. 199	267, 410

Digitized by Google

		Page.
Moore v. Goedel	34 N. Y. 527	661
Moore v. Robertson	25 Abb. N. C. 173	656
Moore v. Taylor	42 Hun, 45	654
Moorman v. Hoge	2 Sawyer, 78	69
More v. Bennett	48 N. Y. 472	411
Morey v. Tracey	92 N. Y. 581	611
Morris v. Morange	38 N. Y. 172	613
Morse v. Morse	85 N. Y. 53	551, 738
Morton v. Tucker	145 N. Y. 244	610
Morton v. Woodbury	153 N. Y. 254	397
Mount v. Waite	7 Johns. 434	347
Mowers v. Fethers	61 N. Y. 87	699
Muller v. Balke	47 N. E. Repr. 355	673
Muller v. Levy	52 Hun, 123	40
Muller v. Struppman	6 Abb. N. C. 350	738
Mullins v. Mullins	79 Hun, 421	551
Murray v. Marshall	94 N. Y. 611	416
Myers v. Burns	35 N. Y. 269	129

N.

Nassoiy v. Tomlinson	148 N. Y. 326	360
Nathans v. Hope	77 N. Y. 420	155
National Bank of Newburgh v. Bigler	83 N. Y. 51	406
National Broadway Bank v. Hitch,	66 Hun, 401	36
Naylor v. Baltzell	Tan. 55; Fed. Cases, No. 10061	308
Nazro v. Cragin	3 Dill. 474	680
Ne-ha-sa-ne Park Ass'n v. Lloyd	7 App. Div. 365	77
Neuchatel Asphalt Co. v. Mayor	155 N. Y. 373	522
Nevins v. Dunlap	33 N. Y. 676	175
Newman v. Alvord	51 N. Y. 189	71, 535
New York Building Co. v. Fisher,	23 App. Div. 363	347
New York City Baptist Mission Society v. Potter	20 Misc. Rep. 191	676
New York & E. R. R. Co. v. Purdy,	18 Barb. 574	237
New York Lumber & Woodworking Co. v. Seventy-third Street Building Co.	22 N. Y. St. Repr. 314	611
Nickerson v. Nickerson	127 U. S. 668	719
Norris v. Kohler	41 N. Y. 42	640
Norton v. Woodruff	2 N. Y. 153	162
Numrich v. Supreme Lodge	24 N. Y. St. Repr. 287	88

O.

Oakley v. Cokalete	16 App. Div. 65	15
O'Brien v. Smith	1 Black (U. S.) 99	149
O'Connell v. Beecher	21 App. Div. 298	694
O'Dougherty v. Remington P. Co	81 N. Y. 490	582
Ogdensburgh & L. C. R. R. Co. v. C. R. R. Co.	63 N. Y. 176	450
O'Gorman v. Harby	75 N. Y. St. Repr. 911	128
O'Hanlan v. Scott	89 Hun, 44	36
Onslow v. Horne	3 Wilson, 177	410
O'Reilly Co. v. Greene	18 Misc. Rep. 423	522
Ormiston v. Olcott	84 N. Y. 339	285
Orvis v. Curtiss	8 Misc. Rep. 681; 28 N. Y. Supp. 728	121
Orvis v. Elmira, Cortland & A. R. R. Co.	17 App. Div. 187	689

Digitized by Google

		Page.
Ostrander v. People	29 Hun, 513	51
Owens v. Flynn	7 Misc. Rep. 171	473
Oxley v. Lane	35 N. Y. 340	282

P.

Paine v. Chandler	134 N. Y. 385	387
Pardee v. Fish	60 N. Y. 265	209
Parish v. Wheeler	22 N. Y. 507	494
Parker v. Conner	93 N. Y. 118	729
Parker v. Jackson	16 Barb. 33	627
Parmenter v. Fitzpatrick	135 N. Y. 190	91
Parrish v. Sun Pub. Assn.	6 App. Div. 585	337
Paulding v. Chrome Steel Co.	94 N. Y. 340	407
Payne v. Gardiner	29 N. Y. 146	209
Pease v. Smith	61 N. Y. 477	463
Peck v. Goodberlett	109 N. Y. 189	204
Peets v. Bratt	6 Barb. 662	736
Pegram v. N. Y. El. R. R. Co.	147 N. Y. 149	594
People v. Allen	6 Wend. 486	400
People v. Bank of North America	75 N. Y. 549	356
People v. Brickner	8 N. Y. Crim. Rep. 217; 15 N. Y. Supp. 528	506, 571
People v. Briggs	60 How. Pr. 17	506
People v. Brooklyn, F. & C. I. R. R. Co.	89 N. Y. 85	378
People v. Clark	8 N. Y. Crim. Rep. 174	571
People v. Croswell	3 Johns. Cas. 354	413
People v. Durrin	2 N. Y. Crim. Rep. 328	430
People v. Edwards	25 N. Y. Supp. 480	573
People v. Everhardt	104 N. Y. 594	572
People v. Field	1 Lans. 222; 52 Barb. 198	675
People v. Flagg	17 N. Y. 584	20
People v. Haines	6 N. Y. Crim. Rep. 100	571
People v. Judges, etc.	24 Wend. 491	105
People v. Kenney	96 N. Y. 302	14
People v. Kerrigan	75 Cal. 222	484
People v. Kings	2 Caines, 98	673
People v. Loch	19 Misc. Rep. 634	136
People v. Leonard	11 Johns. 504	673
People v. Lord	12 Hun, 282-287	429
People v. McLeod	1 Hill, 377	505
People v. Murray	89 Mich. 276	484
People v. Nelson	13 Johns. 339	674
People v. N. Y. & N. B. R. R. Co.	84 N. Y. 565	724
People v. O'Brien	111 N. Y. 1	205, 376
People v. O'Donnell	15 N. Y. St. Repr. 141	429
People v. Petrea	92 N. Y. 128	570
People v. Powers	147 N. Y. 104	391
People v. Quant	12 How. Pr. 91	587
People v. Rathbone	145 N. Y. 437	497
People v. Reed	11 Wend. 157; 8 Am. & Eng. Ency. of Law, 167	673
People v. Restenblatt	1 Abb. Pr. 268	506
People v. Richards	108 N. Y. 137	724
People v. Singer	5 N. Y. Crim. Rep. 1	571
People v. Smith	24 Barb. 16	676
People v. Stock	26 App. Div. 564	478
People v. Teed	48 Barb. 424	677
People v. Upson	79 Hun, 87	51
People v. Utica Insurance Co.	15 Johns. 357	232
People v. Van Nostrand	9 Wend. 50	675
People v. Van Santvoord	9 Cow. 660	573

Digitized by Google

		Page.
People v. Vaughan	19 Misc. Rep. 298; 76 N. Y. St. Repr. 959	571
People v. Whitney	1 T. & C. 533	676
People v. Wright	19 Misc. Rep. 135	136
People v. Yeager	71 N. W. Repr. 491	484
People ex rel. Academy of Sacred Heart v. Commissioners of Taxes of New York	6 Hun, 109; affd., 64 N. Y. 656	6
People ex rel. Anderson v. Hoag	11 App. Div. 74	712
People ex rel. Barry v. Mercein	3 Hill, 399	268
People ex rel. Bedell v. Kinney	24 App. Div. 309	478
People ex rel. Board of Police v. Shulman	8 App. Div. 517	140
People ex rel. Cahill v. Barker	5 App. Div. 227; affd., 150 N. Y. 570	296
People ex rel. Cairns v. Murray	148 N. Y. 171	6
People ex rel. Chamberlain v. Forrest	96 N. Y. 544	318
People ex rel. Clausen v. Murray	5 App. Div. 441	6, 448
People ex rel. Cline v. Robb	126 N. Y. 180	296
People ex rel. Comrs. of Charities v. Cullen	153 N. Y. 629	81
People ex rel. Davids v. Wilson	13 How. Pr. 446	682
People ex rel. Decker v. Whitney	1 T. & C. 533	682
People ex rel. D., L. & W. R. R. Co. v. Clapp	64 Hun, 547	319
People ex rel. Downey v. Dains	38 Hun, 48	104
People ex rel. Edison Co. v. Campbell	138 N. Y. 543	190
People ex rel. Edison E. I. Co. v. Barker	139 N. Y. 55	195
People ex rel. Equitable Gas Light Co. v. Barker	144 N. Y. 94	196
People ex rel. Fairchild v. Preston	140 N. Y. 553	491
People ex rel. Fairfield Chemical Co. v. Coleman	115 N. Y. 178	191
People ex rel. Fitch v. Lord	9 App. Div. 458	28
People ex rel. Higgins v. Grant	37 N. Y. St. Repr. 629	296
People ex rel. Hoyt v. Commissioners	23 N. Y. 224	190
People ex rel. Johnson v. N. Y. Produce Ex.	149 N. Y. 401	501
People ex rel. Keator v. Moss	6 App. Div. 414	268
People ex rel. Kenney v. Cornell	6 Misc. Rep. 568; 27 N. Y. Supp. 895	488
People ex rel. Lawyers' Surety Co. v. Anthony	7 App. Div. 132	247
People ex rel. Lynch v. Duffy	49 Hun, 276	51
People ex rel. McDonald v. Keeler	99 N. Y. 463	498
People ex rel. M. R. Co. v. Barker	146 N. Y. 304	194
People ex rel. N. Y. Hospital v. Purdy	58 Hun, 386; 126 N. Y. 679	95
People ex rel. Pacific Mail Co. v. Commissioners	46 How. Pr. 315	190
People ex rel. Panama R. R. Co. v. Commissioners	104 N. Y. 240	191
People ex rel. R., W. & O. R. R. Co. v. Haupt	104 N. Y. 377	319
People ex rel. Schwab v. Grant	126 N. Y. 473	734
People ex rel. Simon v. Gross	50 Barb. 231	646
People ex rel. Sinkler v. Terry	108 N. Y. 1	50
People ex rel. Sloane v. Barker	76 Hun, 454	190

Digitized by Google

		Page.
People ex rel. Standard G. L. Co. v. Gilroy	68 Hun, 323	377
People ex rel. Subway Co. v. Barker,	7 App. Div. 27	195
People ex rel. Trowbridge v. Commissioners	4 Hun, 595; affd., 62 N. Y. 630	190
People ex rel. Tweed v. Liscomb	60 N. Y. 559	679
People ex rel. Union Trust Co. v. Coleman	126 N. Y. 433	191
People ex rel. White v. Rochester	11 Hun, 243	49
People ex rel. Young Men's Ass'n v. Sayles	23 Misc. Rep. 1	449
Perry v. Dickerson	85 N. Y. 345	155
Person v. Fidelity & Casualty Co.	84 Fed. Repr. 759	680
Pettit v. Shepard	32 N. Y. 97	688
Peyser v. Wendt	87 N. Y. 322	751
Philadelphia v. Woman's Christian Ass'n	125 Penn. St. 572	6
Phyfe v. Elmer	45 N. Y. 102	450
Pierson v. Fries	38 N. Y. Supp. 765	50
Pitcher v. Hennessey	48 N. Y. 415	175
Place v. Hayward	117 N. Y. 487	246
Plantner v. Plantner	78 N. Y. 90	159
Plets v. Johnson	3 Hill, 112	735
Pollard v. Lyon	91 U. S. 225	411
Pollock v. Farmers' L. & T. Co.	158 U. S. 601	14
Pope v. Nickerson	3 Story, 465	309
Popham v. Cole	66 N. Y. 69	70
Potter v. Ogden	136 N. Y. 384	679
Potts v. Herman	7 Misc. Rep. 4; 57 N. Y. St. Repr. 78	40
Poultney v. Bachman	31 Hun, 49	161
Powers v. Schlicht Heat & Power Co.	23 App. Div. 380	524
Prentiss v. Brewer	17 Wis. 635; S. C., 86 Am. Dec. 730	688
Preston v. Grant	34 Vt. 201	360
Prince v. Brooklyn Eagle	16 Misc. Rep. 186	169, 266, 413
Prince Manf. Co. v. Prince Metallic Paint Co.	135 N. Y. 33	70
Protection L. Ins. Co. v. Foote	79 Ill. 361	88
Pruyn v. Black	21 N. Y. 300	628
Pulling v. People	8 Barb. 384	270
Putman v. Man	3 Wend. 202	544

Q.

Quinlan v. Welch	141 N. Y. 158	694

R.

Radley v. Kuhn	97 N. Y. 35	283
Randall v. Randall	114 N. Y. 499	717
Ransom v. Vermilyea	11 N. Y. St. Repr. 683	347
Rathbone v. Hooney	58 N. Y. 463	246
Rauth v. Davenport	60 Hun, 72	651
Read v. Williams	125 N. Y. 560	391
Reciprocity Bank	17 How. Pr. 323; 22 N. Y. 9	203
Redmond v. Ind. Ben. Ass'n	78 Hun, 104	88
Regan v. Fosdick	19 Misc. Rep. 489	623
Reich v. Cochran	151 N. Y. 122	466, 696
Remsen v. Wheeler	105 N. Y. 573	13
Revis v. Smith	18 C. B. (86 C. L.) 126	99

Digitized by Google

		Page.
Rex v. Blake	3 Burr. 1732	674
Rex v. Griffith	3 Salk. 169	674
Rex v. Wilson	8 T. R. 358	674
Rice v. Bliss	66 How. Pr. 186	467
Rice v. Rockefeller	134 N. Y. 174	32
Rider Life Raft Co.	97 N. Y. 381	494
Riker v. Cornwell	113 N. Y. 124	393
Ringle v. Matthiessen	10 App. Div. 274	610
Ritterman v. Ropes	52 N. Y. Supr. Ct. 236	725
Roberts v. Derby	68 Hun, 299	175
Roberts v. Monkhouse	8 East, 547	269
Robinson v. Oceanic Steam Nav. Co.,	112 N. Y. 315	680
Rockfeller v. Donnelly	8 Cow. 623	406
Rockwell v. Raymond	5 N. Y. Supp. 642	50
Roderigas v. East River Savings Institution	63 N. Y. 460	679
Rodliff v. Dallinger	141 Mass. 5	462
Roe v. Campbell	40 Hun, 49	354
Roe v. Vingut	117 N. Y. 204	742
Rogers v. Chandler	134 N. Y. 385	387
Rogers v. Murray	110 N. Y. 658	627
Rogers v. Rogers	11 Fed. Rep. 495	70
Rogers v. Squires	98 N. Y. 53	247
Romeo v. Garofalo	25 App. Div. 191	523
Romeyn v. Sickels	108 N. Y. 652	625
Roosevelt v. Roosevelt	6 Abb. N. C. 447	293
Root v. King	7 Cow. 613; 4 Wend. 113	169
Rose v. Hatch	125 N. Y. 427	391
Rosenberg v. Lustgarten	41 N. Y. St. Repr. 623	118
Rosenblum v. Gorman	21 App. Div. 618	601
Rosevelt v. Brown	11 N. Y. 148	586
Ross v. Caywood	16 App. Div. 501	731
Ross v. Hurd	71 N. Y. 14	150
Ross v. Mather	51 N. Y. 108	473
Ross v. Wood	70 N. Y. 11	99
Rothschild v. Mack	115 N. Y. 1	371
Rothschild v. Mosbacher	26 App. Div. 167	360
Royal P. B. Co. v. Sherrell	93 N. Y. 331	70
Russell v. Whipple	2 Cow. 536	736

S.

St. Michael's Church v. Behrens	10 Civ. Pro. 181	512
San Diego County v. California Nat. Bank	52 Fed. Repr. 59	589
Satterthwaite v. Vreeland	3 Hun, 154	344
Savage v. Burnham	17 N. Y. 561	281
Sawyer v. Thurber	14 Civ. Pro. 204	597
Schick v. Fleischhauer	26 App. Div. 210	96, 633
Schmitz v. Langhaar	88 N. Y. 503	111
Schneider v. Leitzman	11 N. Y. Supp. 434; 57 Hun, 561,	676
Scholle v. Scholle	113 N. Y. 261	541
Schultz v. Hoagland	85 N. Y. 464	176
Schulz v. Rohe	149 N. Y. 132	532
Schumacher v. Waring	7 Misc. Rep. 161	466
Schuyler v. Smith	51 N. Y. 309	117
Scott v. Armstrong	146 U. S. 499	408, 589
Scott v. Depeyster	1 Edw. Ch. 513	293
Scott v. Montells	109 N. Y. 1	468
Secor v. Sturgis	16 N. Y. 548	155
Seixo v. Provezende	12 Jur. (N. S.) 215	72
Selchow v. Baker	93 N. Y. 59	70

Digitized by Google

		Page.
Selover v. Harpending	18 Abb. N. C. 253	407
Seymour v. S. F. C. Association	144 N. Y. 341	495
Seymour v. Wilson	19 N. Y. 417	729
Shafer v. United Brotherhood	22 Misc. Rep. 363	143
Shakespeare v. Markham	10 Hun, 311; affd., 72 N. Y. 400	717
Shangle v. Hallock	6 App. Div. 56	510
Shanks v. Stumpf	23 Misc. Rep. 264	413
Shapely v. Abbott	42 N. Y. 443	630
Sharkey v. McDermott	91 Mo. 655	718
Shaw v. Lambert	14 App. Div. 265	630
Shellington v. Howland	53 N. Y. 371	201, 586
Sheridan v. Mayor	68 N. Y. 30	459, 656
Sherman v. McKeon	38 N. Y. 266	450
Sherwood v. Travelers' Ins. Co.	12 Daly, 137	469
Shipman v. Rollins	98 N. Y. 311	281
Shoecraft v. Bailey	25 Iowa, 553	699
Shore v. Miller	80 Ga. 93; S. C., 12 Am. St. Rep. 239	688
Shulte v. Sickles	147 N. Y. 704	114, 307
Sibbald v. Bethlehem Iron Co.	83 N. Y. 385	344
Sickels v. Herold	149 N. Y. 334	201
Simmons v. Cloonan	81 N. Y. 557	387
Simmons v. Hazard	58 Hun, 119	432
Simon-Reigel Co. v. Gordon-Burnham Co.	20 Misc. Rep. 598	659
Simon v. Simon	6 App. Div. 469	144
Sinking Fund Cases	99 U. S. 700	207
Sleeper v. Goodwin	67 Wis. 577	207
Sluyter v. Williams	37 How. Pr. 109	354
Smart v. Smart	97 N. Y. 559	106
Smiley v. Fry	100 N. Y. 262	209
Smith v. City of Rochester	76 N. Y. 506	315
Smith v. Countryman	30 N. Y. 655	234
Smith v. Dinsmore	9 Daly, 188	357
Smith v. Edwards	88 N. Y. 92	281
Smith v. Lewis	3 Johns. 160	99
Smith v. McGovern	65 N. Y. 575	344, 620
Smith v. Marrable	11 M. & W. 5	352
Smith v. Matthews	152 N. Y. 152	172
Smith v. Meyers	109 Ind. 9	680
Smith v. Smalley	19 App. Div. 521	463
Smith v. Smith	4 App. Div. 227	473
Soderman v. Kemp	145 N. Y. 427	532
Sotters v. Cheeney	74 Ga. 790	246
Southern v. How	Popham, 144	72
Southern Express Co. v. Hunnicutt,	54 Miss. 566	357
Southwick v. Bank	84 N. Y. 420	625
Southwick v. Stevens	10 Johns. 442	412
Sparks v. Bassett	49 N. Y. Supr. Ct. 270	129
Sperb v. McCoun	110 N. Y. 605	247
Spofford v. Rowan	124 N. Y. 108	321, 512
Spoor v. Newell	3 Hill, 307	354
Stagg v. Beekman	2 Edw. Ch. 89	551
Stagg v. Jackson	1 N. Y. 206	540
Stainbank v. Fenning	11 C. B. 51	307
Stannard v. Hubbell	123 N. Y. 531	582
Staples v. Fairchild	3 N. Y. 41	679
Starin v. Kelly	88 N. Y. 418	729
Starr v. Silverman	23 Misc. Rep. 151; 50 N. Y. Supp. 657	473
State v. Ackerman	51 Ohio St. 163	576
State v. Brearly	5 N. J. L. 555	269

Digitized by Google

		Page.
State v. Brooks	92 Mo. 542	484
State v. Pollok	4 Ired. 305	674
State ex rel. Blaisdell v. Billings,	55 Minn. 468	13
Stebbins v. Brown	65 Barb. 272	83
Stedeker v. Bernard	93 N. Y. 589; 102 id. 327...	450, 628
Steele v. Southwick	9 Johns. 214	412
Steen v. Insurance Co.	89 N. Y. 315	450
Stelker v. Plath	19 App. Div. 376	461
Steinweg v. Erie R. R. Co.	43 N. Y. 123	670
Stenton v. Jerome	54 N. Y. 480	341
Stevens v. Rowe	59 N. H. 578	99
Stevenson v. Lesley	70 N. Y. 512	743
Stewart v. Patrick	68 N. Y. 450	688
Stewart v. Stone	127 N. Y. 501	669
Stimson v. Van Pelt	66 Barb. 151	628
Stirn v. Hoffman House Co.	8 Misc. Rep. 246	161
Stokes v. Stokes	155 N. Y. 581	497
Storrs v. Plumb	30 Hun, 319	614
Story v. Elliot	8 Cow. 27, note, p. 31	269
Strack v. Hurd	28 Abb. N. C. 143	654
Strader v. Graham	10 How. (U. S.) 82	271
Strauss v. Trotter	6 Misc. Rep. 79	628
Stringham v. St. Nicholas Ins. Co.,	4 Abb. Ct. App. Dec. 315	639
Stuart v. Palmer	74 N. Y. 183	13, 499
Sturges v. Allis & Lee	10 Wend. 355	469
Sulzbacher v. Dickie	6 Daly, 476	652
Summerlin v. Hesterly	20 Ga. 689; S. C., 65 Am. Dec. 639	688
Sutton v. Hayden	62 Mo. 101	718
Suydam v. Hoyt	1 Dutch. (N. J.) 230	614
Suydam v. Smith	52 N. Y. 383	587
Svenson v. Atlantic Mail Steamship Co.	57 N. Y. 108	640
Swayne v. Vance	28 Ark. 282	688
Swift v. Hart	35 Hun, 128	731
Switzer v. Norton	3 App. Div. 173	114
Sylvester v. Crohan	138 N. Y. 494	149
Syracuse, Bing. & N. Y. R. R. Co. v. Collins	3 Lans. 29; affd., 57 N. Y. 641	149
Syuchar v. Workingmen's Ass'n.	14 Misc. Rep. 10	88
Szerlip v. Bair	20 Misc. Rep. 588	474
Szerlip v. Baier	21 Misc. Rep. 692	364

T.

Talcott v. City of Buffalo	125 N. Y. 280	20
Taliaferro v. Bassett	3 Ala. 670	680
Tallman v. Murphy	120 N. Y. 346	129
Tallman v. White	2 N. Y. 70	76
Taylor v. Gillies	59 N. Y. 331	70
Talmage v. Huntting	29 N. Y. 447	105
T. A. Vulcan v. Myers	139 N. Y. 364	73
Taylor v. Phillips	3 East, 155	270
Taylor v. Shew	39 Cal. 536	614
Teed v. Morton	60 N. Y. 502	743
Temple Grove Seminary v. Cramer,	98 N. Y. 121	6
Ten Eyck v. Tibbits	1 Caines, 426	111
Terwilliger v. Wands	17 N. Y. 54	411
The Grapeshot	9 Wall. 141	308
The Hunter	1 Ware, 249; Fed. Cases, No. 6904	307
The Lulu	10 Wall. 202	308

Digitized by Google

		Page.
The Pride of the Ocean	3 Fed. Repr. 162	307
The Scotia	35 Fed. Repr. 907	309
The Virgin	8 Peters (U. S.), 554	307
Thellusson v. Woodford	4 Vesey, Jr., 227; 11 id. 112	750
Thomas v. Scutt	127 N. Y. 133	257
Thomas v. Woods	4 Cow. 173	111
Thomason v. De Mott	18 How. Pr. 529	506
Thompson v. Brown	4 Johns. Ch. 619	296
Thompson v. Burhans	61 N. Y. 60	74
Thompson v. Jones	4 Wis. 106	689
Thompson v. Montgomery	41 L. R. Ch. Div. 35	72
Thompson v. People	23 Wend. 547	576
Thompson v. Whitmarsh	100 N. Y. 35	310
Tillman v. Davis	95 N. Y. 17	743
Tocci v. Powell	75 N. Y. St. Repr. 905	127
Tolman v. Heading	11 App. Div. 264	647
Toole v. Board of Supervisors of Oneida	13 App. Div. 471	6
Toomey v. Andrews	48 How. Pr. 332	446
Toronto Gen. Trust Co. v. C., B. & Q. R. R. Co.	64 Hun, 1; affd., 138 N. Y. 657,	219
Town of New Haven v. Board of Trustees of Sheffield Scientific School	59 Conn. 163	6
Treadwell v. Pomeroy	2 Sup. Ct. (T. & C.) 470	260
Truesdell v. Bourke	145 N. Y. 612	473
Tucker v. Bishop	16 N. Y. 402	743
Turner v. Stallibrass (1898)	1 Q. B. 56	93
Tuthill v. Skidmore	124 N. Y. 148	442
Tuttle v. Hunt	2 Cow. 436	544

U.

Ullman v. Gorman	21 App. Div. 616	601
Ulrich v. New York Press Co.	23 Misc. Rep. 168	266, 413
Underhill v. Palmer	10 Daly, 478	417
United States v. Cook	17 Wall. 168	430
United States Trust Co. v. Black	146 N. Y. 1	748
United States Trust Co. v. Black	3 N. Y. Supp. 453; affd., 31 id. 1134	398
United States Trust v. Tobias	21 Abb. N. C. 393	228
United States Trust Co. v. U. S. F. Ins. Co.	18 N. Y. 199	586
University v. People	99 U. S. 309	576

V.

Vail v. Hamilton	85 N. Y. 453	586
Vail v. Reynolds	118 N. Y. 297	116
Van Allen v. N. Y. E. R. R. Co.	144 N. Y. 179	593
Van Alstyne v. Nat. Commercial Bank	4 Abb. Ct. App. Dec. 449	209
Van Beil v. Prescott	82 N. Y. 630	70
Van Clief v. Van Vechten	130 N. Y. 571	704
Van Cott v. Prentice	104 N. Y. 45	746
Vanderpoel v. Loew	112 N. Y. 167	282
Van Dewater v. Gear	21 App. Div. 201	90
Van Gelder v. Van Gelder	13 Hun, 118	8
Van Guysling v. Van Kuren	35 N. Y. 70	436
Van Kleeck v. Dutch Church of New York	20 Wend. 457	397

Digitized by Google

		Page.
Van Schuyver v. Mulford	59 N. Y. 432	279
Van Vechten v. Paddock	12 Johns. 178	270
Vermilyea v. Palmer	52 N. Y. 471	717
Vernon v. Vernon	53 N. Y. 350	551
Verplanck v. Van Buren	76 N. Y. 259	99
Viele v. Gray	18 How. Pr. 565	170
Vincent v. Newhouse	83 N. Y. 505	743
Vischer v. Vischer	12 Barb. 640	270
Vogel v. Lehritter	64 Hun, 308	558
Vose v. Cockcroft	44 N. Y. 415	450
Vose v. Railroad Co.	50 N. Y. 369	416

W.

Wachter v. Quenzer	29 N. Y. 547	265
Wadsworth v. Wadsworth	21 Week. Dig. 520	467
Wakefield v. Fargo	90 N. Y. 218	724
Wales Mfg. Co. v. Lazzaro	19 Misc. Rep. 477; 43 N. Y. Supp. 1110	621
Walker v. Walker	155 N. Y. 77	81
Wallace v. American Thread Co.	2 Sup. Ct. (T. & C.) 574	260
Wallace v. Blake	16 Civ. Pro. 384	617
Walter v. Bennett	16 N. Y. 250	152, 339, 473
Walton v. Coe	110 N. Y. 109	204
Waring v. McKinley	62 Barb. 622	238
Warner v. Boyer	74 Fed. Repr. 873	312
Warren v. Campbell	14 N. Y. Supp. 165	458
Warren v. Mayor	68 Mass. 84	14
Warring v. Keeler	11 Misc. Rep. 451	545
Waterman v. Shipman	130 N. Y. 301	70
Waters v. Langdon	40 Barb. 408	50
Webber v. Piper	109 N. Y. 496	531
Weidenger v. Spruance	101 Ill. 278	207
Weiler v. Nembach	114 N. Y. 39	76
Weir v. Express Co.	5 Phila. 355	357
Wetmore v. New York Institution for the Blind	3 N. Y. Supp. 179	397
Wetmore v. Porter	92 N. Y. 76	246
Wetmore v. St. Luke's Hospital	56 Hun, 313	394
Wheeler v. Clutterbuck	52 N. Y. 67	708
Wheeler v. Frontier Bank	23 Me. 310	208
Wheeler v. Miller	90 N. Y. 362	211
Wheeler v. Mowers	16 Misc. Rep. 143	234
Wheelock v. Lee	74 N. Y. 495	680
Whitcomb v. Emerson	50 Fed. Repr. 128	311
Whitcomb v. Hungerford	42 Barb. 177	152
White v. Brownell	2 Daly, 329	502
White v. Howard	46 N. Y. 144	540
White v. Rintoul	108 N. Y. 222	106
Wiggin v. Knights of Pythias	31 Fed. Repr. 122	162
Wilckens v. Willet	1 Keyes, 521	498
Wiles v. Suydam	64 N. Y. 173	207
Wilkinson v. Insurance Co.	72 N. Y. 499	450
Willard v. Pike	59 Vt. 202	6
Williams v. Hays	143 N. Y. 442	170
Williams v. Hill	19 Wend. 305	411
Wilson v. Goit	17 N. Y. 442	411
Wilson v. McMillan	35 Am. Rep. 118, note	270
Wilson v. Marion	147 N. Y. 589	729
Winn v. Freele	19 Ala. 171	680
Witkowski v. Paramore	93 N. Y. 467	621
Witt v. Mayor	6 Robt. 451	118

Digitized by Google

		Page.
Wolcott v. Schenk	16 How. Pr. 449	646
Wolfe v. Goulard	18 How. Pr. 64	71
Wood v. Blodgett	49 Hun, 64	331
Wood v. City of Brooklyn	14 Barb. 425	403
Wood v. People	53 N. Y. 511	14
Wood v. Phillips	43 N. Y. 152	673
Woods v. Long I. R. R. Co.	11 App. Div. 16	530
Woods v. Supervisors	136 N. Y. 403	630
Woodward v. James	115 N. Y. 346	743
Wormley v. Wormley	8 Wheat. (U. S.) 421	286
Worthington v. Parker	11 Daly, 561	652
Wotherspoon v. Currie	H. L., 5 L. R. 508	72
Wright v. Duffie	23 Misc. Rep. 338	473
Wylie v. Marine Bank	61 N. Y. 416	345
Wynantskill Knitting Co. v. Murray,	90 Hun, 555	668

Y.

Yates Co. National Bank v. Carpenter	119 N. Y. 550	6
Youngs v. Youngs	45 N. Y. 254	707

Z.

Zieglar v. Corwin	42 N. Y. Supp. 855	49
Ziegler v. Chapin	126 N. Y. 342	20
Zimmerman v. Erhard	83 N. Y. 74	155
Zimmerman v. Kinkle	108 N. Y. 282	247
Zink v. Attenburg	18 How. Pr. 108	628
Zink v. McManus	121 N. Y. 265	76
Zuenzer v. Minzenmair	20 Misc. Rep. 212	738
Zoeller v. Riley	100 N. Y. 102	269

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UNITED STATES CONSTITUTION CITED.

	Page.		Page.
Constitution, art. 4, § 1	268	Constitution, Sixth amendment	482
Constitution, art. 14	13		

NEW YORK STATE CONSTITUTION CITED.

	Page.		Page.
Constitution of 1846, § 1 of art. 8	206	Constitution, art 6	498
Constitution of 1846, § 7, art. 8,	201, 206	Constitution, art. 6, § 2	16
Constitution, art. 1, § 6	573	Constitution, art. 6, § 18	48
Constitution, art. 3, § 18	378	Constitution, art. 10, § 3	296
		Constitution, art. 13	507

UNITED STATES REVISED STATUTES CITED.

	Page.		Page.
1 U. S. R. S., 443	310	U. S. R. S., § 5155	205
1 U. S. R. S., § 4283	311	U. S. R. S., § 5242	408

NEW YORK REVISED LAWS CITED.

	Page.
1 Revised Laws, 96	673

NEW YORK REVISED STATUTES CITED.

	Page.		Page.
R. S., § 2	674	1 R. S. 675, § 69	269
R. S., § 3	674	2 R. S., chap. 6, tit. 1, § 42	324
R. S., § 29	674	2 R. S. 193, §§ 161-166	407
R. S., part 1, chap. 13, tit. 2, art. 2, § 12	75	2 R. S. 507-516	672
R. S., part 1, chap. 18, tit. 4, § 4	406	2 R. S. 508	675
1 R. S., § 14 of art. 1 of tit. 2	283	2 R. S. 752	706
1 R. S. 662, §§ 8, 9, 14 and 16	347	2 R. S. 753, § 13	707
		3 R. S., chap. 8, tit. 10	672

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NINTH EDITION CITED.

	Page.
2 R. S. (Banks Bros.' 9th ed.) 1024, § 52	586
2 R. S. (Banks Bros.' 9th ed.) 1818, § 1	444
2 R. S. (Banks Bros.' 9th ed.) 1819, § 10	623
2 R. S. (Banks Bros.' 9th ed.) 1851, § 5	735
2 R. S. (Banks Bros.' 9th ed.) 1857	281

SESSION LAWS CITED.

	Page.
1838, chap. 260	206
1839, chap. 213	377
1839, chap. 218	376
1848, chap. 319	439
1849, chap. 226	202
1850, chap. 140	374
1857, chap. 344	123
1857, chap. 456	189
1860, chap. 345	126
1860, chap. 360	440
1861, chap. 143	51
1862, chap. 484	123
1863, chap. 93	102
1870, chap. 280	76
1870, chap. 359	452
1871, chap. 219	411
1872, chap. 165	375
1873, chap. 620	76
1874, chap. 570	102
1875, chap. 80	75
1875, chap. 181	59
1875, chap. 267	87
1875, chap. 482	104
1875, chap. 542	225
1879, chap. 53	47
1881, chap. 182	48
1882, chap. 409	202
1882, chap. 410	121, 123, 339, 364, 366, 458, 475
1884, chap. 252	374
1887, chap. 711	14
1889, chap. 373	602
1890, chap. 553	440
1890, chap. 565, § 180	376
1890, chap. 566, § 65	513
1890, chap. 568	101
1892, § 36	377
1892, chap. 399	440
1892, chap. 445	602
1892, chap. 603	22
1892, chap. 676	376
1892, chap. 677	208
1892, chap. 687, §§ 15, 16	521
1892, chap. 688	200, 406
1892, chap. 689	200
1892, chap. 690	576
1893, chap. 55	23
1893, chap. 338, § 37	135
1893, chap. 433	376
1893, chap. 557	440
1894, chap. 448	377
1894, chap. 680	55
1894, chap. 684	576
1895, chap. 240	522
1895, chap. 438	23
1895, chap. 744	23
1896, chap. 112	23, 447, 505
1896, chap. 225	399
1896, chap. 547	706
1896, chap. 650	23
1896, chap. 748	364, 474, 701
1896, chap. 821	605
1896, chap. 908	76, 319
1897, chap. 174	636
1897, chap. 312	448, 712
1897, chap. 371	3
1897, chap. 378	10, 123, 364
1897, chap. 417	281
1897, chap. 418, § 18	80, 611
1897, chap. 419	80
1897, chap. 427	571
1897, chap. 554	135
1897, chap. 612, § 320	736
1897, chap. 768	135

Digitized by Google

CODE OF CIVIL PROCEDURE CITED.

		Page.
Code Civ. Pro.,	§ 5	206
	§§ 229, 232	16
	§ 258	573
	§ 274	627
	§ 313	570
	§ 348	239
	§ 382, subd. 5	424
	§ 384	299
	§ 420	337
	§ 425	545
	§ 437	300
	§ 438, subd. 6	299
	§ 447	409
	§ 448	581
	§ 449	655
	§ 452	409
	§ 456	36
	§ 488, subd. 5	600
	§ 499	600
	§ 502, subd. 3	247
	§ 542	445
	§ 549	723
	§ 553	725
	§ 572	725
	§ 723	174
	§ 775	565
	§ 779	78
	§ 791	253, 504
	§ 793	253, 504
	§ 873	241
	§ 874	241
	§ 894	262, 615
	§ 914	497
	§ 915	497
	§ 916	497
	§ 917	497
	§ 918	497
	§ 919	497
	§ 920	497
	§ 970	595
	§ 1204	627
	§ 1212	337
	§ 1213	337
	§ 1283	62
	§ 1303	642
Code Civ. Proc.,	§ 1331	565
	§ 1340	642
	§ 1344	642
	§ 1421	600
	§ 1487	723
	§ 1533	548
	§ 1561	558
	§ 1638	178
	§ 1639	178
	§ 1674	79
	§ 1691	703
	§ 1726	757
	§ 1837	366
	§ 1906	411
	§ 2231	646
	§ 2235	672, 684
	§ 2245	673
	§ 2253	467, 696
	§ 2263	648
	§ 2471a	752
	§ 2611	558
	§ 2624	452
	§ 2720	225
	§ 2863, subd. 3,	366
	§ 2985	339
	§ 3001	496
	§ 3044	236
	§ 3047	470, 474
	§ 3049	642
	§ 3057	237, 701
	§ 3058	146
	§ 3060	469
	§ 3156	544
	§ 3213	701
	§ 3215, subd. 1,	366
	§ 3216	458
	§ 3229	597
	§ 3232	8
	§ 3268	331
	§ 3271	331
	§ 3296	561
	§ 3343	723
	§ 3345	679
	§ 3417	80

Digitized by Google

CODE OF CRIMINAL PROCEDURE CITED.

	Page.		Page.
Code Crim. Pro., § 10	573	Code Crim. Pro., § 399	570
§ 142	428	§ 487	404
§ 145	402	§ 527	480, 485
§ 256	428, 570	§§ 609, 616	64
§ 258	570	§ 671	506
§ 260, subd. 3,	573		570, 571
§§ 280-284 .430,	573	§ 851	139
§ 293	573	§§ 881, 882	139
§ 313	570	§ 883	140
§ 339	573		

PENAL CODE CITED.

	Page.		Page.
Penal Code, § 443	427	Penal Code, § 689	13
§ 688	13	§ 690	13

RULES CITED.

	Page.		Page.
Supreme Court, rule 23	364, 622	City Court, rule 14	253

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THE

MISCELLANEOUS REPORTS

OF THE

STATE OF NEW YORK,

COMMENCING MARCH, 1898.

THE PEOPLE ex rel. THE YOUNG MEN'S ASSOCIATION FOR MUTUAL IMPROVEMENT IN THE CITY OF ALBANY, Relator, *v.* WILLIAM SAYLES et al., Assessors of the City of Albany, Defendants.

(Supreme Court, Albany Special Term, March, 1898.)

Taxation — Library corporation, using part of its building as a theatre and applying the income to its corporate uses.

A corporation, organized to maintain a public library, reading rooms, lectures and similar moral and intellectual agencies, having no capital stock nor any provision for the making or division of profits, supported by nominal membership fees, which uses a large part of its building for a theatre and public hall and devotes the resulting income solely to the purposes of its creation, is exempt from taxation under chapter 371 of the Laws of 1897.

CERTIORARI to review the action of the board of Assessors of the city of Albany, in assessing the real estate belonging to the Young Men's Association of Albany, and known as Harmanus-Bleecker Hall.

William P. Rudd, for relator.

John A. Delehanty, corporation counsel, opposed.

CLEARWATER, J. The relator is a corporation, organized, under the laws of this state, for the purpose of establishing and main-

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taining in the city of Albany a public library, branch public libraries, reading rooms, literary and scientific lectures, and other means of promoting moral and intellectual improvement, with power to take by gift, purchase, devise or otherwise, and to hold, grant, lease or mortgage its real and personal property, to erect, maintain and furnish proper buildings for its accommodation, and to take, hold and convey such books, cabinets, library furniture and apparatus as may be necessary for attaining these objects and carrying into effect these purposes.

The management and disposition of its real estate is vested in a board of trustees, who have power, among other things, to grant the free use and occupation for such term as they deem proper, of any room, hall or apartment in any building which may be erected upon the lands of the association, to any society organized for the encouragement of science, art or literature, or for such other purpose as to them may seem most advantageous to the interest and prosperity of the association.

It was originally formed in 1833 and, under its rules, the library rooms are open to the public without charge, and the public has the free use, within the rooms, of its books, periodicals and newspapers. Membership may be had on the payment of the nominal due of $1 per year, and entitles a member to the use, by withdrawal, of the books in the library, and to a vote in the selection of officers.

It is the owner of lands on Washington avenue in the city of Albany, about 120 feet in width, and 210 feet in depth, upon which is the building known as Harmanus-Bleecker Hall. This property was obtained from moneys derived from gifts coming through the hands of Amasa J. Parker, a former justice of this court and the then trustee, under a deed of trust executed by Harmanus Bleecker a philanthropic citizen of Albany, consisting of the lot of ground upon which the building stands and a sum of money and public subscriptions by the citizens of Albany and others, aggregating $56,000.

These subscriptions varied in amount from ten cents each, by the school children of the city, to $1,500 contributed by a public spirited citizen.

The building is spacious, substantially constructed, architecturally imposing, and contains, aside from library, recreation and other rooms, a large room furnished and used as a theatre, and provided with a stage, scenery, drop curtain, flies, and the ordinary

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apparatus incident to the rendition of dramatic performances. Its auditorium is divided into the usual boxes, orchestra, dress circle and gallery, and is furnished with chairs for the accommodation of persons attending the entertainments given upon its stage. This room has been and is rented, not for a term of months or years, but from time to time as opportunity offers, as a theatre and public hall, and is said to be the most spacious and best equipped room for such purposes in the city of Albany. The net rental is all used by the relator in carrying out the objects for which it was incorporated. The entire property has never produced revenue sufficient to meet the expenses incident to its maintenance, and in consequence of the steadily growing deficit, it has been necessary to mortgage it for the sum of $10,000, in addition to which there is a floating indebtedness of $3,500.

In preparing the assessment-roll for 1897, the assessors of Albany assessed the property at $115,000, subsequently reducing the assessment to $50,000, at which it remains. The relator sued out a writ of *certiorari* to review the assessment, claiming that the property is exempt from taxation under the amendment of the general act in relation to taxation, chapter 371 of the Laws of 1897, which, so far as relevant, is as follows:

"The real property of a corporation or association organized exclusively for the moral or mental improvement of men or women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, scientific, literary, library, patriotic, historical or cemetery purposes, or for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes; and the personal property of any such corporation shall be exempt from taxation. But no such corporation or association shall be entitled to any such exemption if any officer, member or employe thereof shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof, for any such avowed purposes be a guise or pretense for directly or indirectly making any other pecuniary profit for such corporation or association, or for any of its members or employes, or if it be not in good faith organized or conducted exclusively for one or more of such purposes. The real property of any such corporation or association

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entitled to such exemption held by it exclusively for one or more of such purposes and from which no rents, profits or income are derived, shall be so exempt, though not in actual use therefor by reason of the absence of suitable buildings or improvements thereon, if the construction of such buildings or improvements is in progress, or is in good faith contemplated by such corporation or association. The real property of any such corporation not so used exclusively for carrying out thereupon one or more of such purposes, but leased or otherwise used for other purposes, shall not be exempt, but if a portion only of any lot or building of any such corporation or association is used exclusively for carrying out thereupon one or more such purposes of any such corporation or association, then such lot or building shall be so exempt only to the extent of the value of the portion so used, and the remaining or other portion to the extent of the value of such remaining or other portion shall be subject to taxation."

There is no element of gain in the object or the operations of the relator; no capital stock, nor any provision for the making of profits, or the declaration of dividends. It derives its funds from the rent of this theatre, the nominal fee paid by its members, the contributions of children and the largess of the philanthropic. Whatever it may receive from any source, it holds in trust to be devoted to the objects of its incorporation and to increasing its benefits. Its affairs are conducted for a great public purpose, and the wisdom of attempting to burthen such an institution with taxation is questionable. Is it permissible under the existing law?

It is contended by the learned corporation counsel, who represents the assessors, that as the theatre is leased for hire to persons not members of the association, the entire property is not used exclusively for the purposes for which the relator is incorporated, and that at least the portion so rented is taxable and should be assessed. That in order to come within the provisions of the exemption, it is necessary that the whole property should be actually and physically exclusively used and occupied by the association, its members or the public, without other charge than the nominal fee of membership, and he has fortified his contention with an able and ingenious argument, and by an elaborate and admirable brief.

In determining the precise shade of meaning to be given to the adverb "exclusively," as used in the act, we should examine the context of the statute for the purpose of ascertaining the legislative

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intent, for when that is found, the act will receive that construction which will give it the effect intended, even if, as suggested, it be lacking in lucidity of expression. It is the duty of every commonwealth to promote the education and moral improvement of the young, to encourage them in acquiring a knowledge of the sciences, of literature, and of the mechanic and fine arts; for it is upon the youth of each generation, that the future of the state depends. This can be done in different ways. By the founding and maintenance of universities, and schools, by the grant of lands and moneys, and by exempting from taxation the property of voluntary associations organized for one or more of these purposes The relator is one among many of such organizations. Its expressed object is to improve the moral and intellectual condition of the young men of Albany of all nationalities, parties and sects, and it is not pretended that there has been any diversion of its endowment or income from the purposes for which they were donated, and intended.

It is evident that the legislature had in mind the existence and usefulness of organizations of this character in framing and passing the act of 1897, and it seems to me that its object was to exempt from taxation property, owned by them, actually used in carrying out, upon the property itself, the purposes for which the organization was formed, if of the character specified in the act, and to prevent any corporation or association, no matter how lofty or beneficent its avowed object, from using an averred aim as the pretext for the acquisition and accumulation of property, either real or personal, with the intent of shielding itself behind such an artifice to evade taxation. If the relator never permitted the use of its theatre save to its own members, or to the public without charge, it is admitted that it would then be within the exemption. The fact that it lets the theatre for hire to others, and that it devotes the rent received, to carrying out in other parts of the same building, the purposes for which it is incorporated, does not to my mind deprive it of the protection of the act.

While it may perhaps be questioned whether the intermittent character of the letting of the theatre is a leasing, within the purview of the statute, it cannot justly be said that it is either leased or used for purposes other than the carrying out upon the property itself of the design for which the relator is organized, for as has before been said, the net rental is all devoted to that end and up to this time the relator's operations have been confined to the

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building of which the theatre is a part. The policy of the exemption is the moral and mental improvement of men or women, the formation and maintenance of religious, benevolent, educational, patriotic, scientific, literary, historical and burial associations, all of which are aids to and accompaniments of a refined and advanced civilization. This policy is not subverted, but on the contrary, is promoted by permitting the relator to devote a portion of its premises to a profitable use when they are not needed and cannot be used by its own members. By renting the theatre, the relator is enabled to increase its income, applicable to the purposes of its creation, and to afford to the people of Albany, a commodious and well-appointed place of amusement. If the exemption from taxation enables it to obtain a larger net income, it is an advantage to which it is fairly entitled and which is entirely consistent with the policy upon which the exemption is based.

Not only is this the rule recognized here, but also in other states, cultivating a broad and liberal policy towards the young, the indigent and the infirm. Temple Grove Seminary v. Cramer, 98 N. Y. 121-126; Matter of Will of Vassar, 127 id. 1-15; People ex rel. Cairns v. Murray, 148 id. 171-175, 176; People ex rel. Clausen v. Murray, 5 App. Div. 441; Toole v. Board of Supervisors of Oneida, 13 id. 471; People ex rel. Academy of the Sacred Heart v. Commissioners of Taxes of New York, 6 Hun, 109; affirmed, 64 N. Y. 656; Yates Co. National Bank v. Carpenter, 119 N. Y. 550; Philadelphia v. Women's Christian Association, 125 Penn. St. 572; County of North Hampton v. La Fayette College, 128 id. 132; Gooch v. Association for Relief of Aged, Indigent Females, 109 Mass. 558; McDonald v. Massachusetts General Hospital, 120 id. 432; Town of New Haven v. Board of Trustees of Sheffield Scientific School, 59 Conn. 163; Willard v. Pike, 59 Vt. 202.

In reaching this conclusion, I am not unmindful that taxation is the rule, and exemption the exception, and that an intent to exempt property from taxation is not to be presumed; but the true rule is that statutes such as this, should be construed, not narrowly by the letter, but liberally and broadly, in view of their object and spirit; and the advantages, to be derived from a generous construction, will be more than an equivalent, to the state and to the city of Albany, for the loss that may result from the relinquishment of the right of taxation over the property owned by such organizations as the relator and devoted to kindred purposes. Nor will the state

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or city suffer by such a construction, as it may safely be assumed that assessors and the courts will scrutinize each case as it arises and see that a salutary and benignant law is not perverted to base ends.

I am of the opinion that the assessment is illegal and erroneous, and should be stricken from the roll.

An order to that effect may be framed, and if counsel disagree as to its provisions, it will be settled by me on two days' notice.

Ordered accordingly.

LENA GARRETT, Plaintiff, *v.* BRADFORD R. WOOD, as Executor, etc., Defendant.

(Supreme Court, Albany Special Term, March, 1898.)

Costs on demurrer, where an issue of fact remains to be tried — Code Civil Procedure, § 3232.

Where an issue of fact remains undisposed of after the decision, by an interlocutory judgment, of an issue of law "with costs," the successful party is not entitled to tax costs before notice of trial, but is entitled to costs after notice and before trial, to a trial fee, and to the costs of an appeal taken to the Appellate Division.

MOTION for a retaxation of costs.

Lyman H. Bevans, for motion.

Barnwell R. Heyward, opposed.

CHESTER, J. The plaintiff has procured an interlocutory judgment sustaining her demurrer to the second and third defenses contained in the answer, with costs. In the taxation the clerk has allowed to the plaintiff costs before notice of trial, $25, costs after notice, and before trial, $15, trial fee issue of law, $20, and term fee for September, 1897, $10, besides costs upon appeal to the Appellate Division. The defendant now moves for retaxation, and objects to all the items except the trial fee and costs of appeal.

Where an issue of law and an issue of fact are joined between the same parties to the same action and the issue of fact remains undisposed of when an interlocutory judgment is rendered upon the issue of law, which is the case here, costs are in the discretion

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of the court. Code Civ. Pro., § 3232. The court has exercised this discretion in favor of the plaintiff and has ordered that she "have judgment upon said demurrer, with costs."

There is a considerable conflict in the authorities as to what costs are allowable under such an order. I think the weight of authority is against allowing costs before notice of trial. It was so held in Kneering v. Lennon, 3 Misc. Rep. 247; 51 N. Y. St. Repr. 907, and that only the trial fee of an issue of law was properly allowed, but in that case some force was given to the fact that costs were in the discretion of the court and that it was apparent from the terms of the order that the court, exercising that discretion, only intended to allow the trial fee, because the order was made "with costs *upon said demurrer*." The reasoning of the opinion, however, was sufficient to exclude any other item of costs, if that language had not been used in the order. The item, of costs before notice of trial, was also rejected in Jones v. Butler, 83 Hun, 91, which, like this, was a case where a demurrer by plaintiff to a portion of the answer had been sustained with permission to plead anew, but the court in that case went a step further than in the case first cited and allowed costs for proceedings after notice and before trial in addition to the trial fee. The case was reversed, 146 N. Y. 55, but upon a ground not affecting its authority upon the question of costs.

As the Code of Civil Procedure required the issue of law to be disposed of before the trial of the issue of fact, and as the issue of law was required to be brought to trial upon notice, I think it is proper that the item of costs after notice and before trial should be allowed, as in the case last cited.

The case of Van Gelder v. Van Gelder, 13 Hun, 118, cited by the plaintiff's counsel in support of his contention that he should be allowed costs before notice of trial, is not an authority for that proposition, as the only question involved in that case was as to the amount of the costs of an appeal from an order overruling a demurrer.

I am aware that there are some Special Term decisions holding that costs before notice of trial are taxable on demurrer, but as an allowance of that item here might lead to a subsequent claim of a right to tax the item again in the event of plaintiff's final success in the action, and in view of the authority of the cases referred to, both of which were at General Term, I think the item should be disallowed.

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I also reject the item of term fees for the September term, 1897, as that was a term prior to the interposition of the demurrer and, therefore, it could not have been the issue raised by the demurrer which was on the calendar at that term.

The clerk is directed to retax the bill and to strike therefrom the costs before notice of trial and the term fee for September, 1897. No costs of this motion are allowed as the parties have stipulated that the disposition should be, without costs.

Ordered accordingly.

Matter of TERESA KENNY on *Habeas Corpus.*

(Supreme Court, Kings Special Term, March, 1898.)

New York charter — A term of imprisonment made dependent upon the decision of a question as to which the accused is given no hearing nor notice — Violation of a constitutional right.

A city charter (Laws of 1897, chap. 378, §§ 707-711) which makes the term of the imprisonment of a person, committed for intoxication to the city workhouse, depend, primarily, upon the decision of the superintendent of the city workhouse, made upon an "examination and inspection" of the person committed, as to whether she is identical with a former prisoner; and, finally, upon the decision of the same question by the city commissioner of correction, made from the records upon a written descriptive statement of the prisoner transmitted by the superintendent of the city workhouse, and which permits this determination to be made without notice to the prisoner or opportunity afforded her to be heard, violates the provisions of both the State and Federal Constitutions (U. S. Constitution, art. 14; N. Y. Constitution, art. 1, § 6), declaring that no person shall be deprived of "life, liberty or property without due process of law."

The petitioner has sued out the writ of *habeas corpus*, claiming to be illegally detained by the sheriff of Kings county. The sheriff makes return that he has the petitioner under a warrant of commitment by Jacob Brenner, Esq., a magistrate of the city of New York in the borough of Brooklyn. Such commitment after reciting that the petitioner was convicted before the said magistrate of public intoxication, commands in substance that she be imprisoned in the workhouse of the said city and there detained until

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discharged pursuant to sections 710 and 711 of the city charter, but that such detention shall not exceed six months from the date of the commitment. To this return the petitioner demurs.

John B. Shanahan, for petitioner.

William Van Wyck, Assistant District Attorney, opposed.

GAYNOR J.: The petitioner asserts the constitutional invalidity of the statute under which she was convicted and is held. The statute is very crude and involved. After some difficulty it is found to provide (sec. 707) that upon conviction for "public intoxication, disorderly conduct or vagrancy, the court or magistrate before whom such conviction is had" shall commit the person convicted to the city workhouse or to a county jail, "to be detained until discharged pursuant to sections 710 and 711 of this act, and for a term not exceeding six months from the date of such commitment, and the warrant of commitment shall so recite"; except that if the conviction be for "public intoxication or disorderly conduct", such court or magistrate may impose a fine not exceeding ten dollars, upon payment of which the convicted person shall be forthwith discharged; and if such fine do not exceed two dollars, and be not paid, he shall be detained in the jail one day for each dollar; but if it exceed that sum, and be not paid by five o'clock of the afternoon of the next day after commitment, he shall be transferred from the jail to the workhouse, and be there detained until discharged under the said sections 710 and 711, but not exceeding six months, all as already specified in the case of one committed without fine. Thus, whether committed to the workhouse in either of the two ways, viz., without fine, or in default of payment of a fine, the convicted person is in the same predicament, viz., he can regain his liberty only when discharged pursuant to the said sections 710 and 711. This petitioner was committed without a fine.

We are next to see how such discharge from imprisonment is brought about. Section 708 requires the superintendent of such workhouse "to ascertain from the records thereof, and from examination and inspection of the person committed", whether he has within two years been committed to such institution "upon conviction of public intoxication, disorderly conduct or vagrancy"; and to transmit within twenty-four hours thereafter to the head of the Department of Correction of the city of New York, viz.,

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the "commissioner of correction", "a written statement showing the name, age, sex, residence, occupation, height, weight and the color of the hair of such person, and describing any scars, marks or deformities or other signs whereby such person may subsequently be identified"; also showing "the date of the commitment, the offence for which such person was committed, and the name of the magistrate by whom the commitment was made"; also whether such person has been previously committed to such institution within the said period "for any one of the causes above specified", and if so the number of times, the date of the last previous commitment, the name of the magistrate who made it and the period of actual detention under it. Section 709 requires the commissioner of correction to record all of these particulars in books which are declared to be public records, and directed to be "indexed and kept so as to show whether any person committed" to the workhouse, as aforesaid, "has been previously committed within two years next preceding such commitment" for any of the said causes. Section 710 provides that within three days after such commitment of any person to the workhouse, "it shall be the duty of the commissioner to ascertain from the aforesaid records whether such person has been committed to the workhouse" within two years previous to the date of such last commitment, for any of the said causes, and to thereupon "make a written order specifying the date at which such person shall be discharged." It then provides for graduated terms of imprisonment to be so fixed by the commissioner by such order in each case, according to the number of times the person has been so committed; the lowest term prescribed being five days for a person not previously committed, the next being twenty days for a person previously committed once, and each successive term for a person previously committed twice or more within the two years limit, to be double his last preceding term, but in no case to exceed six months; except that under a commitment for vagrancy, such graduation may in all cases be departed from, by fixing any longer term than the graded term, not exceeding six months. The commissioner of correction is directed to transmit the said order fixing the term to the superintendent of the workhouse, having first entered its date, the name of the person mentioned therein, and the period of his detention, in the aforesaid records. Section 711 gives to the magistrate who signed the commitment, power to discharge a person whose term has been so fixed at more than twenty but less than one hundred and sixty

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days, provided he has served twenty days, but only upon an affidavit of facts which, in his opinion, shall justify such discharge.

Such is the scheme of the statute. To briefly summarize it, this petitioner having been committed to the workhouse, the superintendent thereof has to "ascertain" whether she was ever there under commitment for public intoxication, disorderly conduct or as a vagrant before, within the preceding two years. He has to make such determination from an examination of the records of the workhouse, and an "examination and inspection" of the person committed; in other words, he is to base his decision upon an apparent identity, or lack of identity, of name, or of personal description, or of both, between the person committed and some former prisoner, with all the possibility or likelihood of error from assumed names, and similarity of points and marks of personal description. Then such superintendent has to make and transmit to the commissioner of correction a "written statement" of such identity, if it be found, and containing in every case a minute description by sex, age, weight, height, color of hair, marks, scars, and so on, of the person committed. And then comes the final determination in respect of identity of the person committed with some former prisoner, viz., the said commissioner of correction has to "ascertain" the fact from the said records in his office which the statute requires him to make up from such "written statements" from the superintendent of the workhouse; and having made his determination in respect of identity, he then has to make an "order" fixing the term of imprisonment in accordance with the fact so found, as prescribed by the statute, and transmit such order to the superintendent of the workhouse, who must hold the prisoner for such term.

The magistrate or court has no power to, and does not sentence and commit the convicted person for a term of six months, and such person cannot be held under the commitment for six months, but only for the term fixed by the said order of the commissioner of correction. If the commissioner should fail to make such order, the prisoner could not be held thereafter longer than the five days prescribed in the act for a first offender, if at all. The warrant of commitment is effectual to detain the prisoner only during the time allowed to the commissioner for the fixing of the term, or at all events only during the five days term of a first offender.

To sum up all, the term of imprisonment of the person committed is made by the statute to depend upon whether the superin-

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tendent of the workhouse, and finally the commissioner of correction, shall decide that such person is identical with some former prisoner; and the statute allows such determination of fact to be made without requiring any notice of hearing to such person, and opportunity to be heard thereon.

It seems to me that this statute is violative of the prohibitions of the Federal and state constitutions, against depriving any person of "life, liberty or property without due process of law" (U. S. Const. Art. 14; N. Y. Const. Art. 1, sec. 6). There is no such thing as due process of law without notice of hearing to the person to be affected in his rights, and opportunity to be heard thereunder. Even in the apportioning and levying of a tax or assessment upon property, if the statute providing for it does not require a hearing thereon, upon due notice, of the persons whose property is to be affected, it is void (Stuart v. Palmer, 74 N. Y. 183; Remsen v. Wheeler, 105 N. Y. 573; Matter of Trustees of Union College, 129 N. Y. 308).

The application of this constitutional guaranty to the protection of the liberty of the individual is not less plain (City of Portland v. City of Bangor, 65 Me. 120; State ex rel. Blaisdell v. Billings, 55 Minn. 468).

In order to hold the petitioner more than five days under this commitment (that being the term prescribed under a first commitment), the statute in question empowers the superintendent of the workhouse, and then the commissioner of correction, to determine, without providing for any hearing to her, that she is identical with a person who has served one or more former terms in the workhouse, and then to punish her by depriving her of her liberty for a term prescribed for such an habitual offender. It thus plainly allows her to be punished, not for the offense she was convicted of before the magistrate, but for being a former offender, without requiring that she have opportunity to be heard on the question of fact whether she is such an offender. This is depriving her of her liberty without due process of law.

Some elucidation of the subject by way of analogy may be had by reference to our statute provisions for increased punishment to second offenders (Penal Code, secs. 688, 689, 690). Though they only prescribe such increased punishment, and say nothing about charging the fact of a conviction for a former offense in the indictment, it has always been the practice, and it is held necessary, to so charge and prove it, in order to convict, and enable the court

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to inflict the increased punishment; which indicates that it has always been the opinion that the defendant is entitled to a constitutional trial of the question of former conviction (1 Caine's R. 37; Wood v. People, 53 N. Y. 511; Johnson v. People, 55 N. Y. 512).

The statute under which the state reformatory at Elmira is conducted (Chap. 711 of the laws of 1887) does not furnish any analogy, for the term of imprisonment is fixed by it in every case (sec. 9), only power to the managers to release before the expiration of such term in cases where a permanent reformation has been effected, being given (sec. 14). And the same is the case with the other statutes establishing reformatories or houses of refuge, so far as I have examined; whereas, in addition to the maximum punishment allowed by the statute now in question, for the conviction itself, viz., a fine of ten dollars, or imprisonment for five days, power to add to such imprisonment is given to the prison officials, upon their determination as a fact that the prisoner has been previously committed to the workhouse under the said statute.

The sections of the statute which have been cited create one scheme, and if such scheme be invalid, there is no part or provision of the said sections which is so independent of them that it can be presumed that the legislature would have passed it alone, and that may be disconnected and survive alone (People v. Kenney, 96 N. Y. 302; Lawton v. Steele, 119 N. Y. 241; Warren v. Mayor, 68 Mass. 84; Pollock v. Farmers L. & T. Co., 158 U. S. 601).

Entertaining these views, it is my duty to discharge the petitioner, for she is probably unable to stand the expense of an appeal; but if an appeal be taken by the District Attorney, it should be brought on by consent of the petitioner's counsel at once, in order to prevent protracted uncertainty in the administration of justice before the magistrates.

Ordered accordingly.

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THE NEW YORK MAIL & NEWSPAPER TRANSPORTATION COMPANY, Plaintiff, *v.* JOHN L. SHEA, Individually, and as Commissioner of Bridges of the City of New York, Defendant.

(Supreme Court, Kings Special Term, March, 1898.)

Injunction pendente lite — Punishment for contempt, pending an appeal.

Quaere, whether pending an appeal from an order of injunction pendente lite, a violation of the order can, in the second judicial department, be punished as a contempt? A discussion of the question when a special term of that department would be justified in punishing for a contempt.

MOTION to punish the defendant and others for contempt for alleged disobedience of an injunction order made and entered on the 8th day of February, 1898, restraining the defendant during the pendency of the action from preventing the plaintiff from laying its mail tubes across the New York and Brooklyn Bridge.

Selden Bacon, for motion.

Almet F. Jenks, Ass't Corp. Counsel, opposed.

GAYNOR J.: Following the decision in *Oakley v. Cokalete* (16 App. Div. 65), I cannot grant this motion. In that case the plaintiff's attorney obtained from the judge of this court who was holding the regular Trial Term and Special Term in Westchester county, an order to show cause why leave to serve an amended complaint should not be given. It contained a stay of the trial meanwhile. The defendant's attorney intentionally disregarded the stay, by moving the case for trial and taking judgment by default before another judge sitting at the Saturday Special Term assigned for each Saturday in that county. Upon moving the case for trial he also procured the judge presiding to vacate the said order and stay. This of course the learned judge was wholly without power to do *ex parte,* either as a judge or as a court, as the attorney must have well known, for it is too well known to need that reference be made to the section of the Code for it; and that the attorney was instrumental in having the learned judge do so was no excuse or protection to him, but an aggravation of his offense (Koehler v.

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Farmers & Drovers' Bank, 17 Civ. Pro. 307; affirmed in 117 N. Y. 661). Nor was the order thus treated with contempt, in violation of general rule 37. That rule forbids such a stay of a trial at "Trial Term" only, and not at "Special Term." The constitution (art. 6, sec. 2), and the Code of Civil Procedure (secs. 229, 232, &c.), designate and prescribe Special Terms and Trial Terms separately; and the province of each, and that neither includes the other, are too well established to be susceptible of mistake, much less dispute. The said rule also specifically follows the same nomenclature. Furthermore, it does it in a way not to permit any one to suppose that the part of it to which I have referred could relate to Special Terms. It provides that motions may be brought on "at Special or Trial Terms" by notices of motion or orders to show cause; and then provides (leaving out Special Terms) that no such order, except in the first judicial district, "if served within ten days of the Trial Term" at which the action is to be tried, shall stay proceedings, unless made by the judge appointed "to hold such Trial Term." Moreover, the said rule before its recent amendment to conform to the changes in the judicial system, in express terms related only to "circuit" courts and the "Trial Terms" of superior city courts. Neither the Special Terms of the Supreme Court nor of the Superior City Courts were covered by it, as was well understood and acted upon by both bar and bench. The name Trial Term was unknown to the Supreme Court until the constitutional amendments of 1895, and then the part of the said rule in question was changed by dropping "circuit" courts, and retaining "Trial Term" only, thus leaving it applicable, as it had always been, to terms of court for jury trials only, viz., to our present Trial Terms. Every lawyer knows the difference between a Trial Term and a Special Term, and that when he finds either named in the constitution, the statutes, or the rules of court, the other or both are not meant. Upon the motion to punish the said attorney for contempt, he produced an affidavit which he procured a court clerk to make, to the effect that such clerk believed that the judge who signed the said order to show cause, did not know it contained a stay, apparently because the judge did not occupy himself in perusing the said order as long as the said clerk deemed necessary in order to ascertain all it contained. This was put forward as an excuse for disobeying the order, and served to emphasize the wilfulness of such disobedience. On appeal the Appellate Division reversed the order fining the

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attorney for contempt, saying it was harsh to punish him. I have carefully detailed the facts and the law of that case, so that the purport of the decision on appeal may appear. The case at bar is of a mild character of contempt compared with it. The defendant is a public officer, acting under the advice of the Corporation Counsel, of whom he is required by law to take advice; the advice being that the appeal taken suspends the injunction order. Even though it seems to me that the plaintiff is entitled to have him adjudged in contempt of court, for his refusal to obey the court's said order, yet an order to that effect would be harsh, and should not be granted, according to the decision in the case I have cited. The other persons embraced in the motion are officers and employes under the defendant, except the Assistant Corporation Counsel, and he is acting under his superior. I see no way to grant this motion, or any motion like it, while the said decision on appeal in *Oakley v. Cokalete* shall continue the rule in this judicial department.

I am also confronted by the decision of the late General Term in this judicial department, in *Krone v. Kings Co. El. R. Co.* (50 Hun, 431). In that case the court granted an injunction order restraining the defendant during the pendency of the action from building a station stairway upon the sidewalk in front of the plaintiff's house and lot. The defendant openly treated the order with the grossest contempt, and built the stairway. The court adjudged it in contempt therefor, and imposed a fine. The appeal from the injunction order and the order punishing for contempt were heard together. The court reversed the injunction order, and added, "of course the order to punish for contempt will fall with it," and reversed that also. This decision being the law of this department, I do not see how a court of first instance is at liberty to punish for a contempt of its order, however gross, if that order is appealed from; for if reversed, the contempt is justified, on the ground, it would seem, that contempt for judicial error is always justified. If this decision be correct, the Corporation Counsel's said advice is correct.

Beset by the two decisions I have cited, it is seemly that I deny this motion.

Motion denied.

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PATRICK J. GLEASON, Plaintiff, *v.* WILLIAM DALTON, as Commissioner of Water Supply of the City of New York, and the CITIZENS' WATER CO. OF NEWTOWN, Defendants.

(Supreme Court, Kings Special Term, March, 1898.)

1. **Municipal corporations — Spoliation of city funds — A contract increasing the value of property to be taken by a city.**

   Semble, that a contract by which it is proposed that a city shall take water from a private corporation for three years, at fixed prices, and shall then acquire its franchise and plant is illegal, as the effect of the contract will be to enhance the value of the property of the corporation at the time when the city shall take it.

2. **Same — When competitive bidding is impossible — Determination of city official.**

   Although a city charter requires an expenditure, exceeding $1,000, to be made under a contract let upon sealed bids made on ten days' public notice, the rule does not apply where there is only one possible bidder; and the court has power, at the instance of a taxpayer, to inquire whether the city official, having the power to determine whether there can be more than one possible bidder, has made that determination and this, although the official is not charged with fraud or breach of his official trust.

THIS is a taxpayer's action for a perpetual injunction to restrain the defendant the Commissioner of Water Supply from making a contract with the defendant water company for the supply of water to the city of New York in the borough of Queens without having first advertised ten days for bids. Motion for a permanent injunction.

F. H. Van Vechtan, for plaintiff.

Sheehan & Collin, for defendant company.

A. F. Jenks, for defendant official.

GAYNOR J.: The contract which the Commissioner of Water Supply proposes to make for the city with the defendant the Citizens' Water Company, is for 3,000,000 gallons of water a day,

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and as much more as the said Commissioner may see fit, for three years, at $65 a million gallons, for the territory in the borough of Queens which was formerly Long Island City. Thus is the city to pay $213,000 to the said private water company during the three years, and no one knows how much more. The affidavit of the Chief Engineer of the Department of Water Supply states the purpose of the water officials to be to take water from the defendant water company for the term of the proposed contract, or longer, and then to acquire its franchise and plant for the city. And the proposed contract has in it a clause that the city may buy out the company at the expiration of the contract "at a valuation to be determined at the time of the sale." Reduced to a plain statement, this all means that the franchise and plant of this private water company are needed and are to be acquired for the city by the water officials, but instead of so acquiring them now, and at their present value, the said officials are first going to take water from the said company, and pay it large sums therefor, for several years. By that means it is plain that the revenue of the said company is to be greatly enhanced, and its franchise made of great value, and then such franchise is to be acquired for the city and paid for at that value, instead of at its present value. It is quite impossible to see why this should be done, when the city has unrestricted power to add to its own water plants, and issue bonds to pay therefor. The plaintiff presents an affidavit that the city's own water plant in the said former territory of Long Island City could be made to produce an adequate supply by an expenditure of $150,000. This is controverted by the affidavits for the defendants. But without entering into that question it is not perceived why the mains of the said territory should not be temporarily connected with the mains of the borough of Brooklyn during the few months that it would take for the city to acquire the franchise and plant of the said private water company at their present value, and issue bonds therefor. It is not asserted that the supply and static head of the Brooklyn water system are not ample for such a temporary use. To first enhance the value of such franchise, and then buy it, would be a plain spoliation of the funds of the city.

Although the complaint alleges the said price of $65 a million gallons to be excessive, and that there are two other companies which could bid, and that water can be got by competition for less, it is very doubtful if the complaint is so drawn as to permit the court to grant relief upon the foregoing aspect of the case. The plaintiff seems to desire to put the stress of the case wholly upon

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the allegation that no valid contract may be made, except upon competitive bids after a public advertisement therefor of ten days, and to prevent the case from being decided upon the broader basis which concerns the whole community, instead of only a few water companies holding franchises from the community. No definite allegation of fraud or breach of official duty is made in the complaint. The case must therefore be viewed in that aspect.

Section 419 of the city charter requires that all work and supplies for a job or purpose which in its aggregate involves the expenditure of more than $1,000 shall be done and furnished under a contract founded on sealed bids submitted in response to a notice of ten days by advertisement. This necessarily has reference only to work or supplies which may be the subject of competition, and not to cases where the furnishing of the work or supplies cannot be made competitive (People v. Flagg, 17 N. Y. 584; Harlem Gas Light Co. v. Mayor, 33 N. Y. 309; Matter of Dugro, 50 N. Y. 513; Baird v. Mayor, 96 N. Y. 567). In the *Harlem Gas Light Co.* case, it was held that a contract for the lighting of the streets by gas was valid, though no bids had been advertised for, for the reason that there was only one gas company with a plant in the territory, and capable of making a genuine bid. To require a contract to be given upon advertisement for bids in such a case would be to put the city, to some extent, at the mercy of the one possible genuine bidder. The same rule applies to the present case, if the defendant water company is the only one that can supply the water required, or any substantial part of it. Whether that is the case is a question of fact to be decided upon the trial.

No exercise of discretion by a public official can be interfered with or upset by the courts at the suit of a taxpayer, except upon an allegation in the complaint, and a specific finding of fact thereon, that fraud or breach of official trust was committed therein (Talcott v. City of Buffalo, 125 N. Y. 280; Ziegler v. Chapin, 126 N. Y. 342; Chittenden v. Wurster, 152 N. Y. 345, and 153 N. Y. 664). The Commissioner of Water Supply has the power to determine whether there could be more than one bidder for the water required, if bids were advertised for, but he has no discretion in the premises. He has to determine according to the fact, and the court has jurisdiction to enquire whether he has done so, without any allegation of fraud, or breach of official trust.

The motion for a permanent injunction is granted.

Motion granted.

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THE MCKEE LAND & IMPROVEMENT COMPANY OF ROCHESTER, NEW YORK, Plaintiff, *v.* GEORGE B. SWIKEHARD et al., as Commissioners of Sewerage for the Tenth, Fifteenth and Twentieth Wards of the City of Rochester and Town of Gates, Defendants.

(Supreme Court, Monroe Special Term, March, 1898.)

1. **Assessments — Injustice in the method of laying an assessment must be attacked directly.**

   Injustice in the manner in which an assessment for a sewer has been laid should be attacked in the proceeding itself by means of a writ of certiorari, and cannot be attacked in an equitable action brought to restrain the collection of the assessment subsequently made.

2. **Same — Property benefited by a sewer.**

   Property which may, by laterals, be easily connected with a trunk sewer, may properly be assessed for its cost, and the fact that legislation may be necessary to the construction of the laterals does not change the rule.

3. **Repeal — A law inadvertently included in a repealing schedule.**

   A law, inadvertently included in a schedule of laws declared to be repealed by a general act covering the subject of such laws, is not to be deemed to have been legally repealed.

ACTION in equity, to set aside and restrain the collection of an assessment upon plaintiff's lands for a local improvement.

William Butler Crittenden and John Van Voorhis, for plaintiff.

William F. Cogswell and Charles J. Bissell, for defendants.

DUNWELL, J. This is an action in equity, brought to set aside and restrain the collection of an assessment upon plaintiff's lands situate in the town of Gates, in close proximity to the city of Rochester, for a local improvement known as the West Side Sewer. The course of the sewer is from a point in the town of Gates, a short distance from the western line of the city, northeasterly into the city and through a portion of the western part thereof, to the outlet of the sewer into the Genesee river. The drainage area within the route of the sewer is computed at 6,556.49 acres.

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The sewer commission decided that 3,625.29 acres of this drainage area was benefited by the sewer, and consequently assessed it. Of this number of acres adjudged to be benefited, 1,044 are within the city of Rochester, and 2,581 in the town of Gates. The assessment placed upon lands in Gates was $302,874, and in Rochester, $299,728, a total assessment of $602,602. Plaintiff's tract, consisting of 224.49 acres, was assessed as follows:

Seventy-three hundredths of an acre at $385 per acre, six and seventy-six one hundredth acres at $200 per acre, eighty-five acres at $150 per acre, and one hundred and thirty-two acres at $75 per acre, a total assessment of $24,283.05.

Plaintiff feels aggrieved at what it asserts to be an inequality in the assessment, and which, it alleges, imposes a disproportionately greater share of the expense upon its lands than upon premises of other property owners whose lands are similarly situated or more favorably situated to receive the benefits of the sewer. If this were the only allegation against the assessment, a consideration of defendants' objection, that the assessment is not subject to a collateral attack by action but only upon direct review within the proceeding itself by *certiorari*, might dispose of the case without rendering further examination necessary. But the complaint and testimony raise other questions attacking the acts of the commissioners as unauthorized, and their whole manner of assessment as illegal, which will require a careful examination of all the acts of the commission and the history of the whole case.

The project for the sewer is comprised within several acts of the legislature, the purpose of which is the construction of a trunk sewer for a large district on the west side of the Genesee river in the city of Rochester and town of Gates. This was to be done under the direction of commissioners, who were also to make an assessment upon local property owners, near the route of the sewer, for its costs.

The first act, chapter 603, Laws of 1892, provided that the sewer should begin upon the Buffalo road at Field street. Under this act, the commission, consisting of three members, Horace Pierce, George B. Swikehard and Frank S. Upton, organized and proceeded with the work. They appointed an engineer, William E. Crane, who surveyed and made maps and plans for the work. They let the contract and made an assessment which was completed July 31, 1893. Considerable work upon the construction of the sewer was done under Crane's supervision as engineer.

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The second act, chapter 55, Laws of 1893, provided for an addition to the sewer further south, to take in an additional district of considerable extent. It provided for proceedings relating to the construction of the addition only, treating it as a separate work.

The third act, chapter 438, Laws of 1895, went into effect April 26, 1895, as an amendment to chapter 603, Laws of 1892. It provided for two additional commissioners from the town of Gates. It empowered the commissioners to make a new assessment, vacated the one already made and otherwise considerably enlarged the powers of the commissioners.

The fourth act, chapter 744, Laws of 1895, went into effect May 23, 1895. It repealed chapter 55, Laws of 1893, which had provided for the extension of the sewer as a separate work, and empowered the commission to extend the sewer under construction to a point on or near the Chili road, and to make such change in the dimensions, and limited changes in the route of the sewer, as seemed proper in their judgment.

The Liquor Tax Law, chapter 112, Laws of 1896, passed March 23, 1896, in its schedule of laws repealed, and which the act was intended to supersede, included, erroneously no doubt, chapter 744, Laws of 1895, relating solely to this sewer, probably intending chapter 774, Laws of 1895, which relates to excise.

This obvious mistake was corrected by chapter 650, Laws of 1896, which took effect May 14, 1896, restoring chapter 744, aforesaid, within a period of fifty-two days after its supposed repeal by the Liquor Tax Law. This act in terms ratified and confirmed all acts of the commissioners done or attempted under said chapter 744.

By an examination of the foregoing legislation it will be seen that chapter 603, Laws of 1892, as amended by chapter 438, Laws of 1895, provided substantially the whole procedure to be followed. It empowered the commissioners, among other things, to determine the extent of the sewer, without fixing its southern point by statute. There was no further occasion for chapter 55, Laws of 1893, providing for the southern addition to the sewer, and hence its repeal, by chapter 744, Laws of 1895, which also designated the southern point of the sewer to be fixed by the commissioners on the Chili road, or between the Chili road and Buffalo road.

The work of the commission was commenced under the first act, chapter 603, Laws of 1892. William E. Crane was appointed engineer. His plans for the sewer were adopted, the contract let,

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the work of construction proceeded with under Crane's supervision and an assessment was made for the cost of construction, as the sewer was then planned from the Genesee river to the junction of the Buffalo road and Field street.

It does not appear that any steps were ever taken under chapter 55, Laws of 1893, for the extension of the sewer, with the purpose of proceeding under that act, and after the passage of chapter 438, Laws of 1895, and subsequent to the passage of chapter 744, Laws of 1895, by which acts, chapter 603, Laws of 1892, was amended and chapter 55, Laws of 1893, was repealed, a second assessment was made for the costs of the construction of the whole sewer, including the extension. It is of this assessment that plaintiff complains.

Although the work of construction had proceeded to a considerable extent under chapter 603, Laws of 1892, according to the plans of Mr. Crane, and an assessment had been made thereunder, when the amendatory acts, chapters 438 and 744, Laws of 1895, were passed authorizing the appointment of a new commission and a taking up and prosecution of the work practically *de novo*, the commissioners availed themselves of the new powers conferred, reviewed the existing plans, with the assistance of Mr. Thompson, an engineer appointed by the commissioners in place of Mr. Crane, resigned, adopted some changes therein suggested by Mr. Thompson, and extended and adapted the plans so as to bring the southern extension within the project of the whole sewer as a single work for all purposes, including construction and assessment.

Upon this rearrangement of the proceedings for the prosecution of the work, it was renewed and conducted to completion. The assessment that is questioned was made wholly under these changed conditions. Upon the trial, considerable testimony was given to show how the first assessment was made, and that it differed in its results from the existing assessment and was more favorable to plaintiff. The comparison cannot be of much value, as the present assessment must be considered solely upon its own merits. The commissioners are required by the statute to "apportion the costs upon the several tracts or parcels of land * * * as they shall deem to be benefited by such sewer in proportion to the amount of benefit which each shall be deemed by said commissioners to receive therefrom. Such apportionment shall be in the usual form of an assessment-roll." No method of apportionment was designated.

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Its manner and details were entrusted to the discretion of the commissioners; consequently they were not confined to any particular method, and a departure from the manner of making the first assessment, in arriving at the second, does not of itself involve an error. The change was within the discretion of the commissioners.

The inquiry here, confined to the validity of the present assessment, is to be determined by an examination of the principle adopted and the manner of its application.

As has already been said, the project was for a trunk sewer, by which is understood such a one as would provide sewerage, not only for premises along its route, but for such outlying territory as might conveniently use it by connecting therewith through lateral sewers. The commissioners deemed both classes of territory benefited by the sewer, and the theory of their assessment was, as appears from the testimony, to apportion upon the territory, that had immediate need of the sewer and could make use of it at once, a sum sufficient to pay for a sewer for its own use, and upon the more remote territory, such sum as would pay for the enlargement of the sewer, made necessary to meet its requirements.

In applying this principle to the several classes of territory and the numerous parcels within the several classes, a variety of circumstances appeared, causing differences, in benefit, not only between the several classes of territory, but differences within the same classes and in respect to the numerous parcels thereof. It would not be profitable to recount here the peculiarities of the several localities along the route of the sewer that induced the commissioners to apportion the cost as they did. It is sufficient to say that they were many and of great variety and might well have operated upon their minds to produce the results shown by the assessment.

Somebody's judgment was required to decide the matter. The statute committed the right of decision to the judgment of the commissioners, and so long as the decision remains a matter of judgment within their discretion, it must be regarded as final.

I have not been able to discover that the theory upon which the commissioners proceeded was not fair and conducive to equality of apportionment.

In executing the rule which they had adopted, it is possible that they may not have succeeded in a just apportionment in all cases. It is probable that there are individual instances of error, where the

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burden has been placed unequally. Such is the assertion of the plaintiff, strongly made and strenuously insisted upon in respect to its property, the assessment of which is the subject of this action.

Plaintiff's premises, known as the McKee tract, belong to the class of territory not contiguous to the sewer, but within the area benefited by it. Previous to the undertaking for the construction of a sewer, streets and avenues had been surveyed and staked out through the tract, and it had been plotted into city lots, but improvement stopped at that stage, and it does not substantially differ in appearance from ordinary farm lands. Immediately north of plaintiff's tract, is the Lamberton tract, through which streets had been laid and lots plotted in about the same manner as upon the McKee tract. Each tract is about equally distant from the sewer.

It is to a comparison of the assessment upon these two tracts of land that plaintiff's counsel earnestly invites the attention of the court, asserting that the comparison will show such a conspicuous inequality as to demonstrate error on the part of the commissioners. The error, if any, thus sought to be established, if due to imperfect performance of duty, would not warrant the setting aside of the assessment, but would call for a correction that might be obtained by a writ of *certiorari*. This action would not afford the remedy. This doctrine has been reaffirmed in recent cases.

In County of Monroe v. City of Rochester, 154 N. Y. 570, the court in its opinion says: "That this assessment was highly unjust, the evidence shows; but the reasoning of that opinion is hardly sufficient to take the case out of the rule of law, which forbids a party to dispute, by a collateral attack, the correctness of an assessment, where mere irregularities, or errors of a formal nature, have been committed, or where the ground of complaint is in the excess of the amount of the assessment over his due proportion. The remedy, in such a case, is by *certiorari* to review the proceedings objected to. Apparently, the learned General Term justices were of the opinion that where the evidence shows such an inequality in the assessment as to make it appear, relatively, grossly unjust, inferences are permissible that the municipal officers had adopted some erroneous principle, which resulted in the great injustice to the complainant and which justified the intervention of the court, when appealed to, through an action to vacate the assessment. Such inferences, however, must arise in other facts than those showing a merely grossly unequal assessment. It must appear that, in the methods pursued in making the assessment, the

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inequality was, or may have been, due to some erroneous rule or principle."

To the same effect is Guest v. City of Brooklyn, 69 N. Y. 506; Hoffeld v. City of Buffalo, 130 id. 387.

But it is by no means clear that the assessment upon plaintiff's property is disproportionate to the benefit received in comparison with the Lamberton tract and other adjacent tracts. The evidence tends to show that the commissioners considered the McKee tract more eligible to settlement, situated upon a more desirable street or thoroughfare leading to the city, more marketable for city lots and consequently that it would sooner make use of the sewer. Besides, the general slope of the surface upon the McKee tract is towards the east, while that of the Lamberton tract and others west of it, slopes northward. The commissioners concluded that it would be the better course to build the sewer to take the sewage and drainage of the McKee tract into the trunk sewer at Maple street and enlarged the sewer at that street for the purpose. They decided that the Lamberton tract could be best provided for by drainage into the Gates ditch at Burrows street. That the commissioners might have disposed of the manner of sewerage of the two tracts in practically the same way, by providing sewerage for the Lamberton tract into the trunk sewer through Jay street, in practically the same way as for the McKee tract through Maple street, is probable; but they adopted a different plan and it cannot be said that it was unwarranted in view of differences in location, surface conditions and natural drainage of the two tracts. The difference in plans for the two tracts will enable the McKee tract to use the trunk sewer at a comparatively small expenditure for lateral sewers, whereas the Lamberton tract, by following the plan of the commissioners, must effect its connection by laterals extending northward to the Gates ditch and by utilizing the ditch or by improving the same or by following the valley thereof with lateral sewers that will reach the trunk sewer at Burrows street.

This can only be done at a vastly increased expenditure to the Lamberton tract, which would bring the cost of sewerage to that tract up to an equality, proximately, with the assessment upon the McKee tract. This was the theory upon which the commissioners acted, planned the sewer and made the assessment. There is evidence tending to show that the circumstances referred to account for the difference in assessment of the two tracts. It

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cannot be said that the evidence is insufficient to support the difference of action of the commissioners in respect to the two tracts.

It is objected that, in making the assessment, chapter 55, Laws of 1893, was not followed and that the omission invalidated the assessment. As has been said, that law was an independent act providing for an extension of the sewer and the construction of laterals. The commission proceeded with the main sewer without regard to the extension until after the passage of the amendatory acts of 1895. Chapter 744 of the laws of that year repealed said chapter 55, Laws of 1893, and authorized the extension under the provisions of said chapter 744, instead. The extension was planned and the assessment had been partially proceeded with, when the Liquor Tax Law was passed, March 23, 1896, which is alleged to have effected the repeal of chapter 744, Laws of 1895, thereby reinstating chapter 55, Laws of 1893, the provisions of which it is asserted by plaintiff should have thenceforward been respected, and did, as a matter of law, govern the acts of the commission in the interval between March 23, 1896, the date of passage of the Liquor Tax Law and the restoration of chapter 744, aforesaid, by the passage of chapter 650, Laws of 1896, May 14, 1896. There was no attempt on the part of the commissioners to comply with said chapter 55. If its provisions did govern the procedure for the assessment, the failure to follow its directions would be a serious omission.

It has been recently held in this state, that such an inaccuracy in the enumeration of laws repealed, does not effect a repeal of the law thus mentioned. People ex rel. Fitch v. Lord, 9 App. Div. 458.

It would seem that the doctrine of that case is controlling in this, and that the Liquor Tax Law did not effect a repeal of chapter 744, Laws of 1895.

But even upon the assumption of its repeal, the testimony is undisputed, that, after the restoration of said chapter 744, the commissioners reviewed all the work and questions that they had had under consideration in the interval covered by the alleged repeal and not until such restoration did they pass upon those questions definitely. Although they had considered the allegations of objections to the assessment within the interval of supposed repeal, they had not let the questions considered pass from their hands, but had held them in abeyance and under advisement and did not take final action thereon until the restoration of said chapter 744.

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Final action was thus taken upon the assessment after the passage of chapter 650, Laws of 1896, and the assessment is not affected by the supposed repeal, even admitting it to have the effect of a repeal, because the repealed act had been re-enacted and was in force when the assessment was in fact made.

Nor am I prepared to adopt the view of the learned counsel for the plaintiff that chapter 650, Laws of 1896, did not legalize the acts of the commission during the interval of the alleged repeal.

Legislation was not necessary to legalize the acts of the commission while chapter 744 was in existence, but only while it was asserted to be out of existence during the period of the supposed repeal. What the legalizing enactment intended was to validate such action of the commission as would otherwise have been governed by said chapter 744, had it not been repealed. Not strictly such action as had been taken "under and by virtue of it," although those were the words somewhat inaptly used. The meaning and intendment, however, is quite plain in view of the circumstances and must control the verbal inaccuracy.

Objection is made that the estimate of future improvement taken into account in making the assessment, as testified to by Mr. Thompson, the engineer, was speculative. Such an estimate, of course, could not be certain. The improvement is for future wants as well as for the present. They can only be determined by estimate. Many data were at hand.

The growth of the city is a fact. The extent of its growth and the time such growth has taken in the past afford some guide for the future and indicate magnificent probabilities, clearly removed and separable from mere speculation. These probabilities, both in respect to the facilities to be afforded by the sewer and the extent of its accommodation to a particular tract of land, were the subject of estimate, and it cannot be said that the evidence does not furnish a basis for the conclusion reached.

The point is made that the plaintiff's tract receives no benefit and consequently cannot be assessed. Of course, the principle must be admitted, that, if premises cannot receive a benefit, they cannot be assessed, as the assessment proceeds in all cases upon the principle that the benefit is to be commensurate with the assessment. In this case the trunk sewer is brought within easy access of plaintiff's premises. Upon mere inspection of the maps it would seem that lands destined for city lots, must have received an increased present value from the sewer improvement. But it is said the

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plaintiff has no present right, under any existing statute, to construct connecting laterals or procure the construction of the same. The statutes under which the sewer is constructed and the whole scheme of the improvement, for the safety of the public health contemplate a connection between the sewer and the benefited area.

A practical view must be taken of what is constantly taking place in like matters. It is unheard of, under the circumstances of such a case as this, that the proper legislation and permits, if necessary, to effect a connection between plaintiff's tract and the sewer, would be withheld. There is practically no obstacle, even admitting that it may be necessary, to procure further statutory authority in order to connect with the sewer. This objection does not seem substantial under the circumstances of this case.

Testimony was introduced, and much is claimed for it, to show that one of the commissioners, Luetchford, was governed by improper considerations in his action upon the commission in the assessment of the McKee tract. His language was proved and cannot be defended. It did not,however, occur at a time when action was being taken as to the McKee tract. In fact, a preliminary statement of the apportionment had already been prepared before Luetchford's remark, which, when applied to the McKee tract, shows that the McKee assessment had been practically arrived at by informal action of several members of the commission before Luetchford referred to it. The case does not show that the improper, although perhaps casual remark, of Luetchford controlled the action of the commission or that the action of any member was affected by it; in fact, the contrary appears.

There are several other objections raised by plaintiff that have received careful consideration but are not considered sufficiently important to warrant the setting aside of the assessment.

I must hold that none of the reasons urged will warrant the relief demanded and that the complaint must be dismissed, with costs to the defendants.

Complaint dismissed, with costs to defendants.

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LEWISOHN BROS., etc., Plaintiff, *v.* THE ANACONDA COPPER MINING CO., et al., Defendants.

(Supreme Court, New York Special Term, March, 1898.)

Corporations — Stockholder's suit to enjoin wasteful disposal of assets — Motive immaterial — Excuse for failure to ask directors to bring the suit.

In an action by a stockholder to enjoin a corporation from accepting an offer made for a portion of its property, it appeared that two companies, rivals of each other, but not of the owner corporation, were competing for the property, and had made offers for it, differing in a very large amount, and that the corporation was about to accept the lesser offer, held; that, in the absence of evidence that the lower bidder would be a more desirable purchaser, the injunction should be granted, although the plaintiff was also a stockholder in, and made the greater offer in behalf of, the higher bidder.

The fact that the directors have passed, and refused to rescind, a resolution accepting, so far as they have authority, the lower offer and calling a meeting of stockholders to act upon the offer, is a sufficient excuse for the plaintiff's failure to request the directors to bring the suit.

ACTION for an injunction.

Guggenheimer, Untermyer & Marshall, for plaintiff.

Alexander & Green, for defendants.

DALY, J. The Anaconda Copper Mining Company is the owner of two claims or parcels of mining property in Montana, called the "Snowbird" and the "Sullivan," which are substantially of no value to it, but which, on account of their situation with respect to two other concerns, the Montana Ore Purchasing Company and the Boston & Montana Mining Company, are eagerly sought for by them. It is practically of no consequence to the Anaconda Company which of these concerns becomes the purchaser of the properties, since they are not rivals nor competitors of the Anaconda Company, but of each other; and in fact the properties were originally offered, informally, to the Boston Company and declined before an offer for them at a considerable price was made on behalf

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of the Montana Company. When that offer was made, the Boston Company apparently became anxious to acquire them and plaintiff has made in its interest (as defendant charges and plaintiff does not deny) a much larger offer, which was not accepted. The trustees of the Anaconda Company having called a meeting of the stockholders to vote upon the proposed sale to the Montana Company, this action is brought by a minority stockholder to restrain the holders of over three-fourths of the stock from voting at such meeting and to restrain the company from consummating such sale or from selling said properties, except at public auction. It is first objected by the defendants that this suit is not prosecuted in good faith, because the plaintiff is a stockholder in the Boston Company and is its selling agent, and brings the action in the interest of that company and not to protect the plaintiff's interest in the Anaconda Company. The conceded interest which plaintiff has in one of the concerns which is competing for the purchase of the properties in question is not ground for refusing the relief asked. That interest is not adverse to the defendant company, but the opposite is the fact, for it offers to pay the highest price in open competition for the property which the defendant company is disposed to sell. The motive of plaintiff in bringing the action is immaterial, as it will not result to the prejudice of the defendant. Rice v. Rockefeller, 134 N. Y. 174-184. The plaintiff is not sailing under false colors, nor coming into equity under pretense of aiding the company, while really in an interest inimical to it. Forrest v. Manchester R. Co., 4 De G., F. & J. 126. It favors one of the competing concerns, it is true, but the directors of the defendant company and the majority of the stockholders favor the other. That fact, however, is no ground for imputing bad faith to any of the parties. The president and trustees of the Anaconda Company have negotiated with Mr. Heintze on behalf of the Montana Company in good faith, and having brought the purchaser to their terms, have called a meeting of the stockholders to authorize the sale. Naturally they are favorably inclined to their customer, to whom, in fact, the president has promised his support, and nothing in his or their action presents a fair subject of criticism. On the other hand, plaintiff cannot be charged with bad faith when, perceiving the disadvantage to another legitimate interest which would result from this sale, it is able to make a larger offer, and avails itself of its right as a stockholder to insist that the property of the company, which owes its accidental value to the rivalry of com-

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peting companies, shall be disposed of so as to give each an equal chance to acquire it, and to give the selling company the benefit of the competition. It is further objected by the defendants that this action is an attempt by minority stockholder to interfere with the discretion of the trustees in a matter of business policy and management, but where is there room for discretion in the matter of this sale of the properties in question? If it appeared that it were more advantageous in any way to sell to one bidder rather than the other, the court might decline to interfere. Gamble v. Queens C. W. Co., 123 N. Y. 91. But there is no evidence that the Boston Company would be less desirable as a purchaser than its competitor. Corporations, as well as individuals, may be allowed a choice of neighbors, but the isolation of these properties from the lands worked by the Anaconda Company and their contiguity to the lands worked by the other concerns exclude any such ground of choice on the part of the Anaconda Company. The fact that the properties were offered to the Boston Company originally shows that there is no ground for preferring another purchaser at a less sum. So far as appears, such preference would damage the defendant corporation by at least the difference between the present offers namely, $50,000, without any advantage, however, slight, to set off against that loss. Nor does the obligation, if any, on the part of the president and trustees, growing out of the negotiations they have already had with the Montana Company, furnish a ground for declining judicial inquiry into the propriety of the contemplated sale. The prospective purchaser well knew that the question had to be submitted to a vote of the stockholders, and that there was no obligation until that was had, and that until that time the trustees were bound to entertain a more advantageous offer. The objection that the directors have not been requested to bring this action does not appear to be well taken, in view of their attitude towards the plaintiff's formal request to them to reconsider their resolution, by which they accepted, so far as they were authorized so to do, the proposition reported by the president. Clearly, it would be an idle formality to request them to seek to enjoin themselves or to take legal measures to restrain the stockholders from doing what they have called them together to effectuate. The chief objections to the motion are thus briefly noted, and I do not see any good reason for withholding the relief asked upon this motion, viz.: that pending the action the consummation of the proposed sale to the Montana Company at a price much in-

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ferior to that offered by the plaintiff should be restrained. The plaintiff will be required, of course, to deposit the amount of its offer as security for any loss which may be sustained by the defendant, the Anaconda Company, by reason of the injunction, and to protect that company in the event of a sale to the plaintiff or at public auction being finally ordered by the court. The Central Trust Company is not restrained otherwise than its codefendants are enjoined during the pendency of the action. The order may be settled upon notice.

Ordered accordingly.

THE ONEIDA COUNTY BANK, Plaintiff, *v.* PHILIP E. LEWIS, Impleaded, Etc., Defendant.

(Supreme Court, Oneida Trial Term, March, 1898.)

1. **Bills and notes — Right of indorser sued to pay the holder and continue the action.**

   An indorser has a right to pay the holder of a note, take an assignment of the cause of action and continue, without being substituted therein as plaintiff, in an action begun by the holder against the parties to the instrument.

2. **Same — Judgment discharging joint debtor.**

   The entry of judgment against one of the makers of a firm note is a bar to a subsequent judgment against another maker.

3. **Same — Severing an action against joint debtors.**

   Section 456 of the Code of Civil Procedure, relative to severing an action where only a part of the defendants have been served, does not apply to defendants whose liability is joint.

4. **Same — Indorsement by maker — Recovery against prior indorser.**

   A maker of a joint note who has indorsed it after the indorser, may, after its protest and after his payment of it to the holder, recover of the indorser in an action brought by the holder and which the maker is continuing for his own benefit, as the presumption is that his liability as indorser is precedent to that of the indorser against whom he seeks to recover.

IN this action recovery is sought against the above-named defendant as maker and indorser of a certain promissory note. After the action was commenced the note in question was taken up by

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one Crossman, another indorser, and the action is now really being prosecuted by him in the name of the bank.

It is urged by way of defense that the action is not being prosecuted in the name of the proper and real party in interest; that said Lewis as maker was liable jointly upon said note with another and has been released by entry of judgment against said other; that as indorser he is subsequent to said Crossman and, therefore, not liable to him, the real plaintiff in the action.

S. M. Lindsley, for plaintiff.

E. D. Lee, for defendant.

HISCOCK, J. The note in question is the last of two or more renewals. At the time the original note of the series was made the defendant Lewis and one Gardner were copartners and the proceeds of the original note, when discounted by the plaintiff, were placed to their credit as such. All of the notes were in the same form and were made and indorsed respectively by the same parties as the present one. When suit was commenced by the plaintiff service was not obtained upon the present defendant and Crossman. An order was made providing that the action be severed and that the plaintiff might proceed against said last-named persons as if they were the only defendants herein, and upon the same day judgment was entered in said action against the other parties to said note. After the summons and complaint had been issued against all of the defendants, including Lewis, Crossman, as above stated, paid to the plaintiff the amount of said note and the same and the cause of action thereon were transferred to him.

In answer to the first defense urged, it seems to be well settled that Crossman, being an indorser and liable upon said note, had the right to make the payment which he did to the plaintiff and to take an assignment and transfer of the note and cause of action and continue the prosecution thereof in the name of the bank. He might have been substituted as plaintiff, but this was not necessary. Concord Granite Co. v. French, 65 How. Pr. 317; Madison Square Bank v. Pierce, 137 N. Y. 444; McGean v. M. E. R. Co., 133 id. 9.

The second defense seems to be well taken so far as the liability of Lewis as maker of the note is concerned.

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The note is in the form of and is a joint obligation by the makers Lewis and Gardner. This being so, the entry of judgment against one of such makers, Gardner, is a bar to a second judgment against Lewis on his liability as maker. Candee v. Smith, 93 N. Y. 349, 351; O'Hanlan v. Scott, 89 Hun, 44, 47-48; National Broadway Bank v. Hitch, 66 id. 401.

The attempt to sever the action and obtain leave to proceed with it against Lewis and Crossman while taking judgment against the other maker of the note was evidently made under section 456 of the Code of Civil Procedure, which is not applicable to the case of defendants jointly, and not severally, liable.

The defendant Lewis, however, in addition to signing the note as maker, indorsed it. That indorsement was of course an irregular one, but by it he subjected himself to individual liability upon the note. Daniels on Negotiable Instruments (4th ed.), § 703.

The note having been properly protested, I see no reason why the original holder at least, the bank, could not have held him as indorser as well as maker, if desired. In fact, the only object which can be discerned, if any there was, in his indorsing the note was to create a several and individual liability as distinguished from his joint liability as maker. The name of Crossman, however, appears upon the note ahead of that of Lewis, and it is, therefore, urged that Lewis as indorser was not liable over to him, and he, Crossman, being the real plaintiff here cannot recover as against Lewis as such subsequent indorser.

The bank could have recovered against all of the indorsers, including Lewis. But assuming that there could be urged in defense of this action, now being continued by Crossman, although in the name of the bank, any defense which would be available in an action brought by Crossman in his own name, I do not think that the argument of priority as between the indorsers themselves, made by the defendant, is a good one. Ordinarily indorsers are liable as between themselves in the order in which their names are placed upon the note. But this rule is subject to various exceptions, as matter of law, and independent of evidence of any express agreement. For instance, when a stranger places his name as indorser upon a note above and before that of the payee, the law nevertheless presumes that he is an indorser second to the payee. Daniel on Negotiable Instruments (4th ed.), § 704.

In the case at bar, Lewis was one of the makers of the note and ultimately liable for it, and it would seem to me a legal inference

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that in indorsing the note he became liable as the indorser before Crossman, who was a stranger to the note, although as a matter of fact Crossman's name may have been placed upon the note before that of Lewis. Otherwise, independent of any discharge of Lewis as maker, there would be a succession of rights leading to circuitous and unnecessary actions. Lewis as last indorser would have a right to recover against Crossman and then Crossman in turn would have the right to recover over against Lewis as one of the makers. In the end, the responsibility of the note as between Crossman and Lewis would settle down upon Lewis as the maker, and this result, thus to be ultimately reached, is directly accomplished by drawing the inference as above suggested, that the liability of Lewis as indorser was prior to that of Crossman. These views lead to a judgment in favor of plaintiff.

Judgment for plaintiff.

CATHERINE J. HENSBERRY, Plaintiff, *v.* MARY S. CLARK, Defendant.

(Supreme Court, Onondaga Special Term, March, 1898.)

Pleading — Services — Denial upon information and belief.

A denial, upon information and belief, is proper in an action for services and particularly, in a case, where the claim is made that the defendant was not in a suitable mental condition to have made the contract claimed by the plaintiff.

MOTION to strike out answer as frivolous and sham.

F. W. Talbot, for motion.

George D. Cowles, opposed.

HISCOCK, J. The action is brought to recover for services claimed to have been performed for and at the special instance and request of defendant. The answer is a denial upon information and belief of every allegation in the complaint, and the granting of the motion is urged upon the theory that the answer is sham rather than frivolous. It is claimed that a defendant may not properly deny upon information and belief allegations of facts which are to be assumed to be within his personal knowledge.

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I think that, under the circumstances of this case at least, the motion should be denied.

A denial upon information and belief is good as a matter of form merely. Bennett v. Leeds Mfg. Co., 110 N. Y. 150.

An answer so denying has been held good where it would appear that the defendants were chargeable with personal knowledge of the matters in controversy. Harvey v. Walker, 59 Hun, 114.

But in this case the presumption, which might otherwise prevail, that defendant had personal knowledge of the matters set forth in the complaint and, therefore, should deny, if at all, absolutely and not upon information and belief, is rebutted by the affidavits read in her behalf upon this motion. It appears from them that her mental condition was such, during the time when plaintiff's contract is said to have been made with her and in part performed, that she cannot remember what took place. In fact, it is claimed that she was not in a suitable mental condition to have made the contract claimed by plaintiff. Under these circumstances and if she was not in mental condition to make a contract she very likely might have relied upon that as a defense and have denied as matter of law that she did make the contract claimed by plaintiff even though she had gone through the form of so doing. Upon the other hand, however, it was proper for her to deny as a matter of information and belief that she went through the form even of making the contract.

The motion is, therefore, denied, with $10 costs to defendant to abide event.

Motion denied, with $10 costs to defendant to abide event.

Matter of the Application of THE NEW YORK STATE BANKING CO. *v.* MARY A. VAN ANTWERP.

(Supreme Court, Onondaga Special Term, March, 1898.)

Examination of one expected to be made a defendant — Attempt to make a disclosure of an agency — Notes made by the principal in his own name.

Where the apparent purpose of an application, to examine a woman who is, as it is alleged, expected to be made a party defendant in an action hereafter to be brought, is to ascertain what she will swear to

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upon the subject of the alleged agency of her husband in making certain notes as "agent," and whether an action can successfully be maintained against her upon the theory that her husband made the notes as her agent, the application must be denied, not only because the provisions of the Code of Civil Procedure cannot be used for such a purpose, but also because she could not, in any event, be made liable as principal upon notes which her husband made and signed in his own name as agent.

MOTION to vacate an order directing an examination at the instance of said banking company of said Van Antwerp as an expected party defendant to an action hereafter to be brought.

H. M. Van Bergen, for application

C. G. Baldwin, opposed.

HISCOCK, J. The affidavit upon which the original order of examination was made, amongst other things, sets out in substance that the above banking company is the holder of two certain promissory notes each made by "S. Van Antwerp, agent," and upon which action is about to be brought in the Supreme Court against the said Mary A. Van Antwerp; that for several years the said S. Van Antwerp who executed said notes has been conducting a business under the name of S. Van Antwerp, agent, and that at the time said notes were made and prior thereto the said S. Van Antwerp, who is the husband of the said Mary A. Van Antwerp, frequently stated to said banking company that he was conducting the business in question as agent for his said wife; that since the maturity of said notes said banking company "is informed and verily believes that said Mary A. Van Antwerp states and claims that her husband was conducting said business without authority from her."

There is nothing in said notes or in the affidavit in question other than above to show that the same were made in behalf of said Mary A., or that she was in any way a party thereto.

Independent of the question hereinafter discussed, I doubt if this is a case where the petitioner was entitled to an examination of the expected adverse party. An examination of the affidavit seems to lead to the conclusion that the plaintiff has determined to bring its action and that it is possessed of all the knowledge necessary for that purpose and to frame its complaint thereunder and

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that the real purpose of the examination is to see what the proposed defendant will swear to upon the subject of her husband's alleged agency and whether an action can be successfully maintained against her upon the theory of such agency.

While it is difficult to reconcile the many decisions upon this subject, it seems to be pretty well settled that such a purpose is not contemplated or provided for by the provisions of the Code under review. Churchman v. Merritt, 51 Hun, 375, 377; Potts v. Herman, 7 Misc. Rep. 4; 57 N. Y. St. Repr. 78; Green v. Carey, 81 Hun, 496; Byrnes v. Ladew, 15 Misc. Rep. 413.

There is, however, another objection to the granting of the order which seems to be insuperable.

It is essential that, in order to secure such an order, it was incumbent upon the petitioner to show that it had a cause of action against the proposed defendant. Muller v. Levy, 52 Hun, 123; Churchman v. Merritt, 51 id. 375.

The proposed defendant, as above stated, is not shown by the terms of the notes upon which the suit is to be brought against her, or by any proper allegations of the affidavit outside of those notes, to be a party to them or responsible upon them. The theory upon which the suit is to be brought against her is evidently that of holding her as principal upon notes made and signed by her husband in his own name as agent. This, however, it is well settled cannot be done. Manufacturers & Traders' Bank v. Love, 13 App. Div. 561.

The motion to vacate said order is, therefore, granted, with $10 costs.

Motion granted, with $10 costs.

ISAAC D. PLACE, Plaintiff, *v.* JAMES H. CONKLIN et al., Defendants.

(Supreme Court, Orange Special Term, March, 1898.)

Contract to procure a woman a husband, upon a consideration payable from the fruits of the marriage — Right of defrauded husband to restoration.

Proof, made in an action brought to procure the restoration of property, tending to show that, after the defendant had entered into a secret marriage brokerage contract with his cousin, payable from the fruits of the marriage, he induced the plaintiff, who was an

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intimate friend, to marry the cousin; that the plaintiff thereupon gave her certain money and deeded her certain property; that she thereafter gave the defendant the money and mortgaged to him the property in accordance with her prior agreement with him, entitles the plaintiff to maintain the action, as the contract of the defendant is against public policy and the plaintiff has been fraudulently deprived of his property by an immoral and illegal contract, having that result as its expressed object.

ACTION to set aside a contract and for restitution.

A. H. F. Seeger, for plaintiff.

Samuel E. Dimmick (S. W. Fullerton, of counsel), for defendant Conklin.

Brown & Cassedy, for defendant Dumville.

HIRSCHBERG, J. There is very little dispute between the parties as to the facts in this case, and none as to the controlling facts. The plaintiff in the summer of 1895 resided alone at Washingtonville on a place owned by him, and which cost him $3,400, and he was possessed of personal property of the value of about $3,500. He was a widower and very old. The defendant James H. Conklin was a neighbor and intimate friend. The plaintiff had experienced difficulty in procuring a satisfactory housekeeper, and in conversation with Conklin, informed the latter that if he could find a woman who would prove satisfactory in that capacity he, the plaintiff, would give her $500. Conklin referred to his cousin, the defendant Mrs. Place, then Mrs. Hall and at service in Vermont, as a person who would probably suit the plaintiff and undertook to write to her and see if she would come. Conklin says the plaintiff told him he would marry the woman if she suited him and that, on the day he married her, he would give her $500 in cash, a like amount in stock, and a deed of his house and lot at Washingtonville. On the 16th day of June Conklin did write to his cousin, urging her to come to Washingtonville, and informing her that the plaintiff had asked him to write to her in regard to marrying him, describing the plaintiff as a man about seventy-five years old, "very old and can't live very long at the longest" and with a fortune of about $75,000 or $80,000. On June 23d, he wrote her again in much the same strain, and two or three times in July, always urging her to come and assuring her of the plaintiff's wealth

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and the ample provision he could and would make for her in the event of their marriage. In response to these letters, the defendant did come to her cousin's house on July 15th, where the plaintiff met her and an engagement was made, within a day or two, for their marriage on July 24th. At the time of the engagement the plaintiff agreed in Conklin's presence to give his cousin $500 on the day of the marriage and a deed of the Washingtonville property. On July 22d Conklin and his cousin, in pursuance of a previous verbal understanding, executed a written agreement, reciting the fact that Conklin had introduced her to the plaintiff and that she and the plaintiff had become engaged to be married through Conklin's recommendation, counsel and advice, and binding her, in consideration thereof, to pay him $500 and to execute and deliver to him her bond for $3,500 secured by her mortgage, on the property then occupied by the plaintiff. The marriage took place July 24th at Conklin's house and, at the conclusion of the ceremony, the plaintiff gave his wife a check for the promised $500 which she at once transferred to Conklin. Subsequently a promissory note of the plaintiff's was substituted for the check and was ultimately collected by Conklin. The deed of the Washingtonville property, however, was not executed until July of the following year. The plaintiff did then deed that property to his wife, largely through Conklin's efforts, and on the same day Mrs. Place executed and delivered to Conklin in pursuance of their written agreement a bond, secured by mortgage on that property, for $2,000. Conklin claims to be still entitled to the additional $1,500 called for by the terms of his written contract with Mrs. Place. The action is for the purpose of procuring restitution to the plaintiff and no opposition or defense is interposed by Mrs. Place.

There is no room for doubt that the contract between Conklin and Mrs. Place is illegal and void as against public policy, and that she could maintain an action to cancel and annul the bond and mortgage and to recover back the money paid. It seems equally clear that the plaintiff can maintain such an action, although his claim to a reconveyance of the real estate might not be enforced against his wife's opposition. On the first proposition the case of Duval v. Wellman, 124 N. Y. 156, is quite decisive. In that case a woman had paid $50 to a matrimonial agent for introduction to a prospective husband, and it was held that she could enforce restitution, notwithstanding she was *particeps criminis*. The leading authorities are therein cited and the decision is based on the

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broad ground that the natural tendency of the business of promoting marriages is immoral, resulting in ill-advised and often fraudulent marriages and necessarily injurious to the public interest and welfare. A contract to procure a husband or wife for a consideration is regarded as *fraudulent in its character*, and the party paying the consideration, although with full knowledge, is nevertheless regarded as acting under a species of *imposition or undue influence*. In such a case the court unanimously held that equity will relieve the injured party by setting aside the contract and restoring him to his original position.

In this case the plaintiff has been deprived of his property by fraud. It is not pretended that he knew anything of the bargain between his wife and Conklin. She had no property of her own and the contract was, in effect, to pay Conklin, for procuring the marriage, by means of money and property to be acquired as the fruits of the union. The unlawful agreement was not to pay Conklin with property belonging to Mrs. Place, but was to procure the plaintiff's property for Conklin through the medium of a forbidden bargain. By the terms of the conspiracy, the husband was to be induced to part with his property under the mistaken belief that he was making provision for his wife's support and maintenance, whereas, in fact, he was unconsciously furnishing her with funds to be at once used by her in the payment of the purchase price of himself, as a husband, by virtue of a secret and illegal agreement between her and the intimate friend of the husband, through whose active agency the marriage had been effected. The plaintiff's agreement, at the time of the engagement, to pay his wife $500 and to deed her the real estate, was without any valid consideration, except such as the law recognizes in the claims of affection and the duty of providing for and supporting a wife. But such consideration is entirely lacking where the transfer is effected for the sole purpose of satisfying the unlawful demands of a marriage brokerage contract. Clearly, if the husband had himself engaged to pay Conklin for the procuring of a wife, he could recover back all payments made in pursuance of such agreement, and is is difficult to see why equity should refuse him relief merely because he is an innocent victim instead of a willing dupe. He has been fraudulently deprived of his property by means of an immoral and illegal contract, *having that result as its expressed object*. The contract was procured by his intimate friend and adviser who, while pretending to act in plaintiff's interests, was secretly plotting to procure the latter's property for himself. The agency, employed by the

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friend to procure the property, is itself condemned as violative of the law and against public policy, but, nevertheless, has been successful in investing him with the fruits of the contract. The victim has made timely discovery of the imposition practiced on him and has invoked the aid of a court of equity to restore his property, and the settled and fundamental rules of equity forbid that such aid should be withheld.

The bond and mortgage in question were assigned by Conklin to his wife November 12, 1896, and again assigned by her to the defendant Dumville, January 9, 1897. These defendants, however, are not to be regarded as *bona fide* purchasers for value, under the proof in the case, and such assignments are no bar to a decree for full restitution.

Judgment will be rendered for the plaintiff, as demanded in the complaint, with costs against the defendant James H. Conklin.

Ordered accordingly.

Matter of the Final Judicial Settlement of the Account of ELIZABETH REMBE, Administratrix of the Goods, etc., of JOHN HENRY FISHER, Deceased.*

(Surrogate's Court, Rockland County, January, 1898.)

Gift inter vivos — Effect of the inclusion, by the donee, of the gift in her account as administratrix of the donor.

Where a gift, inter vivos, of moneys in a savings bank is clearly established, the fact that the donee, when she took out letters of administration upon the estate of the donor, alleged in her petition that the moneys in question belonged to the decedent, does not present such an inconsistency as precludes the surrogate, upon the judicial settlement of her account, from awarding her the moneys as a gift.

JUDICIAL settlement of the accounts of an administratrix.

George A. Wyre, for administratrix.

A. A. Demarest, for contestant.

TOMPKINS, S. The intestate, an unmarried man, with no near relatives in this country had resided with the administratrix and her

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husband for many years. After the death of her husband, and while the intestate was still living with her, at West Nyack, she determined to give up housekeeping and live with one of her children.

On one of the occasions, when this subject was being discussed by the administratrix, her son, John P. Rembe and the intestate, the intestate said that, if Mrs. Rembe would come to Nyack and keep house for him, he would give her everything he had.

In the month of April, 1895, she moved to Nyack, and the deceased went with her, and continued to reside with her until his death in January, 1896. The only property he possessed at that time consisted of money in the Bowery Savings Bank, which at the time of his death amounted to the sum of about eleven hundred and forty-four ($1,144) dollars.

After his death this administratrix applied for and took out letters of administration upon his estate and now makes and renders her final account as such administratrix.

In and by the account, the administratrix makes the claim that all of the moneys in the savings bank, as aforesaid, belong to her by reason of a gift by the decedent during his residence with her in Nyack, and she now claims the balance of said moneys after the payment of the debts and funeral expenses of the deceased, by virtue of such alleged gift. And a further claim is made of six hundred and fifty-two ($652) dollars for services rendered by her to the decedent in caring for him, boarding, washing, etc.

In support of the gift alleged to have been made by the decedent to the administratrix, her son, John P. Rembe, testified, in addition to what has already been noted, that after they moved to Nyack he heard the deceased say that he intended to give everything to Mrs. Rembe, and that he saw him get up from his chair, go into another room, and get the savings bank-book, in which these moneys were entered, and hand it to Mrs. Rembe, at the same time telling her that "she should take it and keep it and keep him for the remainder of his days." He testified positively that the bank-book, handed to his mother by the deceased, was the Bowery Savings Bank book. He testified further that he had heard the deceased say: "When I die she shall have all the property I die possessed of."

The witness, Elizabeth Armstrong, a daughter of the administratrix, testified that the deceased, in her presence, said that he was going to leave all that he had to her mother.

A complete gift of the moneys in the savings bank is clearly made out by the testimony of the witnesses Armstrong and Rembe, and there is no testimony on the part of the contestant impeaching their

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testimony, or tending to dispute the claim that a gift was actually made. On the contrary, all the circumstances — the fact of the long residence of the deceased with the administratrix and her family, and the fact that he had no family ties or near relatives, and that he was cared for and nursed by Mrs. Rembe, corroborate the claim of the administratrix, and make it appear very reasonable and natural that such a gift should have been made.

The only thing in the case that causes or creates any doubt or question, in my mind, as to the validity of this personal claim of the administratrix is the fact that she applied for letters of administration, and in the petition necessarily alleged that these moneys belonged to the decedent, and now, as such administratrix, seeks to account for them, alleging, however, in her account that the moneys were given to her.

There is an inconsistency between the allegations of her petition for letters of administration, and the fact that she administered at all upon the estate, which consisted only of this fund, and her present claim.

Does the fact that she took out letters of administration, thereby alleging that the property belonged to the decedent, bar her present claim?

I think not, inasmuch as the proof of the claim now made is uncontroverted and so conclusive; and also, in view of the assertion which is now made in behalf of the administratrix, that the petition for letters of administration was made only to enable her to procure the moneys from the bank, without bringing an action against it to establish the gift and her right to the money.

If the claim that a gift had been made rested upon slight proof or upon testimony which was contradicted, then the fact that an inconsistent claim had been made upon application for letters of administration would defeat the claim of a gift; but, in view of the positive testimony in this case and the circumstances, so consistent with the claim, and the explanation made on behalf of the administratrix of her reason for applying for letters of administration, I find that there was a complete gift *inter vivos*, that the administratrix is entitled to the balance in her hands of the fund in question, and that the objection filed should be overruled.

The costs and disbursements of this proceeding, including an allowance of $25 to the attorney for the contestant, to be paid out of the fund.

Decreed accordingly.

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Misc.] County Court, Cayuga County, March, 1898.

NELSON ARMSTRONG, Respondent, *v.* MICHAEL KENNEDY, Appellant.

(County Court, Cayuga County, March, 1898.)

Constitutional law — Jurisdiction of the elective justice of the peace of the city of Auburn.

The legislation (Laws of 1879, chap. 53, § 62, as amended by the Laws of 1881, chap. 182) which created, in the city of Auburn, a justice of the peace, to be elected by the people and to have, in towns, the usual civil jurisdiction of such a justice, is not to be deemed an attempt to create an inferior local court, but is a legitimate exercise of the power, given by section 18 of article VI of the Constitution (as amended in 1869) declaring that "Justices of the peace and District Court justices shall be elected in the different cities of this state, in such manner, and with such powers and for such terms respectively as shall be prescribed by law." The fact that the justice of the peace has no jurisdiction in the city of Auburn, where the City Court of that city has exclusive jurisdiction, does not affect the constitutionality of the legislation.

APPEAL from a judgment of a Justices's Court, rendered by Danforth H. Lewis, Esq., justice of the peace of the city of Auburn, August 3, 1897, in favor of respondent, and against appellant for $7.70 damages and $4.30 costs.

Frank M. Leary, for appellant.

Oscar Tryon, for respondent.

UNDERWOOD, J. The summons in this action, which was issued by the justice of the peace of the city of Auburn, was served on defendant in the town of Montezuma in this county. On the return day defendant appeared specially and objected to the jurisdiction of the justice, challenging his right to send his process outside of the city of Auburn. The objection was overruled and ultimately the case proceeded to judgment against appellant.

The only question presented upon this appeal is that of the jurisdiction of the justice.

From the incorporation of the city of Auburn in 1848, until the passage of its present charter (chap. 53, Laws 1879) there were in

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the city three justices of the peace. By the charter of 1879, a new court, called the City Court of the city of Auburn, was created, upon which was conferred, with other powers, jurisdiction in civil actions and proceedings cognizable by law in Justices' Courts. By subsequent amendment, this jurisdiction was expressly limited to cases in which all the defendants resided, or at the time of the commencement of the action were, within the city of Auburn.

By the same charter of 1879, it was provided that, among other city officers elected by electors of the city at large, there should be one justice of the peace. His place in the judicial scheme provided by the charter for the city appears defined as follows in section 62 of the charter as amended by chapter 182, Laws of 1881:

"The justice of the peace shall have jurisdiction in civil actions and proceedings cognizable by law in Justices' Courts of towns, whether commenced by warrant, attachment, summons or otherwise, or whether on contract or otherwise, except that within the city of Auburn the City Court shall have exclusive jurisdiction as against said justice of the peace."

As, under this charter, the City Court was to have exclusive jurisdiction as against the justice of the peace, within the city of Auburn, it seems clear that it was the legislative intent to confer upon the justice of the peace jurisdiction in those cases, usually cognizable in Justices' Courts, of which the City Court could not assume jurisdiction because of its inability to send its process beyond the city limits.

Thus construed, the charter provided the citizens of Auburn with a local court adapted to their needs, without depriving them of the right, enjoyed by the residents of towns, of prosecuting before a justice of the peace of their own town claims against residents of other towns of the same county.

It is claimed, however, that, by the legislative provisions referred to relating to the justice of the peace, an attempt was made to create an inferior local court, and the constitutionality of the law is challenged for attempting to vest in this court power to send its process outside of the locality for which it was created.

If such is the real purpose and meaning of this legislation the law would, beyond question, be unconstitutional.

It is urged by the respondent, however, that the legislation in question was not an attempt to create an inferior local court, but a legitimate exercise of the power given by section 18 of article VI of the Constitution, as amended in 1869, in the following language:

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"Justices of the peace and District Court justices shall be elected in the different cities of this state, in such manner, and with such powers and for such terms respectively as shall be prescribed by law."

This provision was introduced into the Constitution in 1869. It was suggested, in the Constitutional Convention of that year, as an addition to the section providing for election of justices of the peace in towns, for the reason that otherwise there was no provision for justices of the peace in cities, or for police courts, except in the general clause in regard to local courts of inferior jurisdiction, thereafter to be organized. The delegate who made this proposition insisted that there should be no such distinction between the electors of cities and those of the country. See opinion of Smith, J., People ex rel. White v. Rochester, 11 Hun, 243.

It would seem clear, therefore, that independently of the provision for the creation of inferior courts of local jurisdiction, the Constitution, since 1869, has recognized justices of the peace in cities, as a distinct class, whose powers, terms of office and manner of election, were committed to the Legislature to fix.

And it is contended that, in the provisions of the charter of Auburn defining the powers of the justice of the peace of said city, and fixing his term of office and the time and manner of his election, the Legislature was acting entirely under this constitutional right.

The appellant cites two recent cases decided by the Appellate Division of the Supreme Court in this department, as authority for his contention. Baird v. Helfer, 42 N. Y. Supp. 484; Zieglar v. Corwin, id. 855.

In both these cases the constitutionality of an act was challenged, which purported to confer upon the Municipal Court of the city of Rochester, power to send its process anywhere within the county of Monroe. And it is clearly pointed out that the Municipal Court of Rochester was created as, and was an inferior court of local jurisdiction, within the meaning of the Constitution, and that its jurisdiction could only be exercised in the locality for which it was created, viz., the city of Rochester; that the language of the statutes, declaring that the court was "to be deemed a Justice's Court, each judge thereof a justice of the peace, and the city of Rochester a town of Monroe county" was simply an attempt to evade the purpose and intent of the Constitution, and to give to an inferior local court jurisdiction which the Constitution forbade. Both these cases are clearly distinguishable from the case at bar.

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Under the charter of the city of Auburn, the inferior court of local jurisdiction was the City Court of the city of Auburn. Its powers were by the statute, strictly confined to the locality for whose benefit it was created, while by modifying and defining the duties and powers of the justice of the peace of the city, the rights of citizens of the city were guarded in cases, ordinarily cognizable by justices of the peace, over which the City Court could not exercise jurisdiction.

The precise effect of this constitutional provision, in regard to justices of the peace in cities does not seem to have been considered in any of the reported cases where the jurisdiction of such a justice of the peace has been challenged. In the case of Geraty v. Reid, 78 N. Y. 64, a statute was under consideration, which authorized the Common Council of the city of Brooklyn to divide the city into districts for each of which a justice of the peace should be elected, who was to have the same jurisdiction as justices of towns had, in respect to towns for which they had been elected, and should be deemed justices of the peace of Kings county.

It was held, that it was not the intention of the statute to confer on such justices power to send process outside of Brooklyn, and it is intimated that if such had been the legislative intent the act would have been unconstitutional.

But when the law thus considered was passed the constitutional provision of 1869 had not been adopted and there was no provision (save that for the creation of local inferior courts) by which a justice of the peace could be elected, except by vote of the electors of an entire town.

The cases, in which the constitutional provisions in regard to courts of inferior local jurisdiction have been discussed and applied, seem to have ranged themselves in two classes.

They are either cases in which the Legislature had created justices of the peace or other similar officers, not for cities but for villages or for some portion of a town, or in which the attempt has been to vest a clearly local inferior court with jurisdiction outside of the locality for which it was created.

To the first class may be assigned People ex rel. Sinkler v. Terry, 108 N. Y. 1; Bocock v. Cochran, 32 Hun, 521; Waters v. Langdon, 40 Barb. 408.

To the second class Rockwell v. Raymond, 5 N. Y. Supp. 642; Pierson v. Fries, 38 id. 765; Curtin v. Barton, 139 N. Y. 505;

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Zieglar v. Corwin, *supra;* Baird v. Helfer, *supra;* People v. Upson, 79 Hun, 87.

The case at bar does not fall in either of those classes. It seems to me to have been a proper exercise of the constitutional power in regard to justices of the peace in cities.

The situation is not affected by the fact that, under the charter, the justice of the peace of the city of Auburn does not have the same jurisdiction as justices in towns. The constitutional provision referred to evidently contemplated justices of the peace in cities, with powers subject to definition and limitation by the Legislature. That the Legislature, in this particular case, has seen fit to deprive the justice of jurisdiction in cases where the City Court can exercise jurisdiction, is simply an exercise of this constitutional right. People ex rel. Lynch v. Duffy, 49 Hun, 276; Ostrander v. People, 29 id. 513.

In the case of People ex rel. White v. Rochester, *supra*, it was held that the Legislature had power to abolish the offices of justices of the peace of the city of Rochester created by chapter 143 of the Laws of 1861, and it was said that their courts were local inferior courts. But, in 1861, when this law was passed, there was no constitutional provision for justices of the peace except in towns and the legislation then had could only have been valid as an exercise of the right to create "inferior courts of local jurisdiction." Dawson v. Horan, 51 Barb. 459.

Since writing the foregoing opinion my attention has been called to the fact that this question was passed upon by this court by my predecessor, Hon. S. E. Day, in 1888, in the case of Wride v. Counsel. In a carefully written opinion he discusses the cases decided to that time, arriving at the conclusion that the justice of the peace of Auburn has jurisdiction of an action begun by service of summons outside of the city of Auburn.

None of the cases decided since that time, to which my attention has been called, seem to me to have in any way changed the situation.

The judgment appealed from is affirmed, with costs.

Judgment affirmed, with costs.

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HARRY P. FIELDING, Plaintiff, *v.* THE COHOES MASONIC TEMPLE ASSOCIATION OF THE CITY OF COHOES, N. Y., Defendant.

(Supreme Court, Albany Special Term, March, 1898.)

Place of trial — Change for convenience of witnesses.

Where the cause of action arose, and the majority of the witnesses reside, in the county of Albany, the court may, for their convenience, properly change the place of trial to that county from the adjoining county of Rensselaer.

MOTION to change the place of trial from the county of Rensselaer to the county of Albany.

Charles F. Doyle, for motion.

Foster, Kelly & Isenbergh, opposed.

CHASE, J. The Code of Civil Procedure provides that the court may, by order, change the place of trial "Where the convenience of witnesses, and the ends of justice will be promoted by the change." It is conceded that a majority of the necessary witnesses in this case, reside in the city of Cohoes in the county of Albany. The city of Cohoes is connected with Troy, the county seat of Rensselaer county, as well as with Albany, the county seat of Albany county, by electric and steam roads. It is but a few miles from either place. The witnesses can attend in either county without great inconvenience. The cause of action arose in the county of Albany. A long line of decisions of this court hold, in substance, that the ends of justice will be promoted by requiring an action to be tried in the county where the cause of action arose, unless there is some other and better reason which requires its trial elsewhere. The condition of the calendars in the counties of New York and Kings constitutes a sufficient reason why causes should not be sent from adjoining counties to either of those counties for trial. No such reason exists in regard to the county of Albany. The order is granted with $10 costs to abide the event.

Order granted, with $10 costs to abide event.

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Matter of the Application of THE VILLAGE OF LEROY by its President and Trustees to vacate and set aside a judgment entered November 18, 1897, confirming the report of Commissioners appointed to Appraise Certain Lands and Property, etc.

(Supreme Court, Erie Special Term, March, 1898.)

1. **Villages — Failure to submit to a vote the establisment in a village of a lighting system — Effect upon condemnation proceedings taken to acquire an existing system.**

Where a general statute (Laws of 1894, chap. 680) provides that, before a village board of water commissioners can establish a village lighting system, the question whether the village shall establish or acquire such a system must be submitted to the voters, the submission, at a village election, of the simple question whether the taxes authorized by the statute shall be levied and collected of the village affords no authority to the board to acquire by condemnation a lighting system which exists in the village and the proceedings in question are absolutely void. The distinction between the statute in question and chapter 181 of the Laws of 1875, considered and stated.

2. **Villages — Waiver of statutory conditions — Estoppel — Rescission and restoration.**

A village has no authority to waive a statutory condition precedent, that a popular vote must be taken upon the question whether the lighting system shall be established in the village; and hence is not, although part performance has been made by the owners of the lighting system acquired, estopped from moving, by its board of trustees, to set aside the condemnation proceedings; but, while it is entitled to rescind, it must also restore what it has received in the proceedings.

MOTION by the village of LeRoy to vacate and set aside certain proceedings heretofore had in this court, for the purpose of acquiring title to certain lands in the village of LeRoy, together with the gas generators, gas reservoir and other property belonging to the LeRoy Gas Light Company, together with the franchises, system, privileges and property of said company, by condemnation.

William T. Cogswell, for village of LeRoy.

Norris Morey, for water commissioners of village of LeRoy.

George Bowen, for LeRoy Gas Light Company.

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WHITE, J. The village of LeRoy is a municipal corporation in Genesee county in this state.

On June 5, 1897, two of the three water and light commissioners of said village made a petition to this court, on behalf and in the name of said village, for the purpose of acquiring by condemnation the plant and property of the LeRoy Gas Light Company, a domestic corporation, then engaged in furnishing to said village and its inhabitants gas and electric light.

Such proceedings upon said petition were thereupon had that afterwards, and on June 16, 1897, the said LeRoy Gas Light Company, being then and there present in court and not objecting thereto, an order was made by this court, which in terms adjudged that the condemnation of the property then sought to be acquired was necessary for a public use and that the village was entitled to take and hold the said property for the public use specified in said petition upon making compensation therefor, and three commissioners and appraisers were appointed to ascertain and appraise the compensation to be made for the property then sought to be taken.

The commissioners proceeded in the manner provided by law, and made their report, which was presented to the court November 18, 1897, whereupon the said report was confirmed and it was adjudged and decreed that the compensation so ascertained and appraised be paid and distributed to and among the persons entitled thereto, according to the said report. And it was further adjudged and decreed, among other things, that the LeRoy Gas Light Company be allowed and paid by the village $550 as disbursements, and the further sum of $500 as counsel fees on said proceedings; that, upon payment of the balance of the award to the LeRoy Gas Light Company within thirty days from that date, the property be turned over to the plaintiff for its use and benefit; that the LeRoy Gas Light Company execute and deliver proper acknowledgments of payment and deeds of conveyance of its lighting plant, and that it recover costs and disbursements to be taxed.

The village took possession of the plant and for about three months has been operating it and receiving the emoluments therefrom, although no part of the judgment has been paid or satisfied.

The proceedings in question were instituted on March 11, 1897, when the water and light commissioners signed and presented to the board of trustees of the village, at a special meeting, then

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being held by them, a communication in the words and figures following:

"*To the Trustees of the Village of LeRoy, Genesee county, New York:*

"GENTLEMEN.— We, the undersigned water and light commissioners of the village of LeRoy, having heretofore resolved ourselves into a board of water and light commissioners for said village, in the manner provided by law, and believing it is for the best interest of our taxpayers and citizens that this village should establish and maintain its own lighting system, respectfully request your honorable board to call a special election of the voters and taxpayers of the village of LeRoy to vote upon the question of taxation of the citizens of said village for the debt and expenses to be incurred by the water and light commissioners in purchasing, constructing, establishing and maintaining a lighting system and plant for said village of sufficient capacity to supply said village and the inhabitants thereof with light for municipal purposes, in the manner provided by chapter 680 of the Laws of 1894."

The said board of trustees thereupon, at its said meeting, adopted a resolution in the words and figures following:

"*Resolved*, That a special meeting of the voters and taxpayers of the village of LeRoy, N. Y., whose names appear on the last assessment-roll of said village, or who are qualified to vote on the question of taxation for the village lighting debt and expenses be, and the same is hereby called for the 30th day of March, 1897, at the village hall in said village, at which place the polls will be opened at 9 o'clock, a. m., and shall continue open without interruption until 4 o'clock, p. m., at which time they shall be closed; at which time and place the question will be submitted (by ballot) whether the taxes in this act authorized for the purposes aforesaid shall be levied and collected from the village as in said act provided."

The above application and resolution, preceded by the words, "Notice of Special Tax Meeting to vote upon the Question of Village Lighting System," and a record of the special meeting held by the board of trustees March 11, 1897, at which the application was considered, were published in the LeRoy Gazette, a newspaper published in the village once a week, for two weeks as and for a notice of the said election so as aforesaid ordered to be held by said trustees.

On March 30, 1897, an election was held in and for the said village pursuant to said notice.

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The ballot used at the election was in the words and figures following:

(Notice to voters. For an affirmative vote upon any question submitted upon this ballot, make a cross (X) mark in the square after the word "Yes." For a negative vote make a similar mark in the square following the word "No." Any mark or erasure made on this ballot, except as above indicated, makes this ballot void, and it cannot be counted. Use only a pencil having black lead.)

YES. ☐

NO. ☐

Shall the taxes authorized in chapter 680 of the Laws of 1894, entitled, "An act to authorize the villages of the state of New York to furnish electric light or gas light to the inhabitants thereof," for the purpose specified in said act, be levied and collected from the village of LeRoy, New York, as in said act provided.

(Indorsed on the back of said ballot.)

(Consecutive number.)

Official ballot for the village of LeRoy, For and Against a Lighting System, March 30, 1897. Question submitted.

WM. R. CROFOOT,
Clerk of the Village of Le Roy.

Cross-marks were made on a majority of the ballots cast, within the voting space or square opposite the word "Yes," on the ballot.

The authority for taking and prosecuting the condemnation proceeding was chapter 680 of the Laws of 1894, which provides, that the board of water commissioners of any village, having a water-works system belonging to the village, shall have the power to establish a lighting system within said village, for the purpose of supplying light by means of electricity, gas or other approved system to the inhabitants of said village, and the act authorizes such water commissioners to issue bonds or other certificates of indebtedness, upon the faith and credit of said village, to procure the necessary funds for establishing such lighting system under certain conditions, and to establish and maintain such lighting system to supply the inhabitants with light and to collect rentals therefor; and further provides that the commissioners, upon establishing such a lighting system, may then arrange with the trustees of the village for the public lighting of such village, *and the trustees* may then levy and collect a tax to pay any deficiency in rentals for the expense of such public lighting.

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The statute prohibits the establishment of a lighting system until after the proposition to establish it shall have been submitted to a popular vote at an annual or special election and commands that, at such election, the ballots shall be "For a Lighting System" or "Against a Lighting System." If a majority of votes cast be in favor of a lighting system, the commissioners may proceed to establish the same; otherwise they shall not. Where, as in this case, a lighting system had already been established by private persons for the purpose of furnishing light to the village and its inhabitants under a franchise or contract granted or made pursuant to law, and was then engaged in furnishing such light, and a majority of the voters of such village shall have decided to establish a lighting system, the board of water and light commissioners shall proceed to acquire by condemnation. This motion is based upon the claim that the judgment of November 18, 1897, and all the proceedings which led up to the pronouncing of that judgment, are void for noncompliance with the provisions of the statute upon which such proceedings were based. The initial act on the part of the water commissioners was their communication of March 10, 1897, to the trustees of the village in which they request them to call a special election of the voters of the village to vote upon the question of taxation of the citizens of said village for the debt and expense to be incurred by the water and light commissioners in purchasing, constructing, establishing and maintaining a lighting system and plant for said village of sufficient capacity to supply said village and the inhabitants thereof with light for municipal purposes, in the manner provided by chapter 680 of the Laws of 1894.

The act of 1894 does not make any provision for submitting to the voters any question concerning the use of a lighting system by the village itself, nor does it make any provision for submitting to the voters any question concerning taxation which may be necessary to raise the money to pay for any lighting system which may be purchased or acquired by the water and light commissioners.

The only question which the statute requires to be submitted to popular vote is the bare one, whether or not the village shall establish or acquire a lighting system, without any authoritative utterance by the voters at the election as to the methods or means to be adopted in paying the expense thereof.

The right and power to establish or acquire a lighting system is vested exclusively in the commissioners. The right of the trustees

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is to secure, by arrangement with the commissioners after they have acquired the lighting system, the furnishing of light to the village.

The money to pay for a plant established and acquired was to be raised upon bonds or certificates of indebtedness for that purpose on the faith and credit of the village, but to be issued by the commissioners.

For reasons already given, neither the request of the commissioners of March 10, 1897, nor the resolution of the trustees therein of March 11, 1897, correctly or approximately describe the object or purpose of the election held March 30, 1897, according to the requirements of the statute.

The sole object and purpose of such an election was to enable those electors, entitled to vote upon the question, to say whether or not the village of LeRoy should or should not acquire a lighting system, without any reference whatever to the price to be paid or the way in which it should be paid.

Notwithstanding this misdescription of the statutory object and purpose of the special election, it would perhaps be harmless if it had been followed by an actual vote upon the question authorized by the statute to be submitted to them by the voters of the village; but a comparison of the provisions of the statute with the form of the ballot used at the election, is conclusive evidence that the question so authorized was not submitted.

The provision of the statute is plain, and admits of no doubt as to its meaning; it is simply whether or not the village shall establish or acquire a lighting plant; that is the full extent to which the electors are entitled to participate in the proceedings.

The proposition, or question, submitted did not, in the remotest way, refer to the question or proposition authorized by the statute, but, by its terms, assumes that the act of 1894 authorizes and regulates the levying of taxes for the purpose of paying for a lighting plant, and asks the voters to say whether such taxes shall be levied and collected from the village; whereas, the act does not contemplate the levying of any taxes to pay for the plant, except upon the contingency of there being a deficiency in the revenue derived from operating it.

The difference between the two propositions or questions is radical, and the language used in giving expression to them clearly establishes the fact that they do not relate even to kindred subjects.

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The subject which the voters were entitled to act upon was solely and simply whether the village should acquire a lighting plant, and they alone were authorized to decide that question.

The act contained a further provision that the board of water commissioners shall collect the rents for water and light furnished the inhabitants of the village and dispose of the moneys thus collected in the same manner as that provided for the disposition of moneys derived from water rentals by chapter 181 of the Laws of 1875, relating to boards of water commissioners, namely, to apply such rentals to paying the interest and principal of the bonds issued to raise money to pay for the plant. There was an entire failure, on the part of the water commissioners, the trustees and the qualified voters, to comply with the provisions of chapter 680 of the Laws of 1894.

It is apparent that, in attempting to comply with the act of 1894 in this proceeding, the water commissioners and trustees of LeRoy followed with more or less accuracy certain formalities, prescribed by chapter 181 of the Laws of 1875, in points where there was no relation between the two statutes. The scheme of the act of 1875 was much broader and more comprehensive than that of the act of 1894. By the act of 1875, the "authorities" of a village were defined to be the board of trustees thereof; it authorized the trustees to organize themselves as a board of water commissioners; it authorized a board of water commissioners thus organized to purchase or acquire by condemnation any lands within the county and erect thereon and operate a water plant for the purpose of supplying the village with water; it authorized and required said board to borrow from time to time upon the credit of the village the money necessary for that purpose, and to issue bonds, certificates, or other obligations signed by them as such commissioners, and make them valid against the village; it required said board to establish rates for water and to collect the same, and that the receipts be applied to the payment of interest upon the money borrowed, and to the creation of a sinking fund for the payment of the principal. If the receipts proved inadequate, the board of trustees was authorized and required to cause the deficiency to be assessed, levied and collected and properly applied. The act made the board of water commissioners a *quasi* corporation, which could contract and sue and be sued as such. The act of 1875 further provided (in section 21) that, at any time after its passage, a meeting of the electors of any village might be called by its board of trustees upon notice published for two weeks in

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one or more weekly newspapers, at which the question was to be submitted whether the taxes, authorized by the act for the purposes named in it, should be levied and collected from the village as in the act provided; and it prohibited the board of water commissioners from proceeding with any duties under the act unless the majority of voters and taxpayers should vote at such meeting in favor of such taxes; it directed that the vote should be by ballot and that there should be written or printed on the ballots of those in favor of the taxes, "For the water taxes," and on the ballots of those opposed, "Against the water taxes." As has already been said, by the act of 1875 the board of trustees was authorized and required, in case of a deficiency in the water rentals, to cause a levy and collection of taxes for the purpose of paying such deficiency, while the act of 1894 authorized no one, under any circumstances, to levy or collect taxes for any purpose. Furthermore, the act of 1875 by its terms was inapplicable to any village wherein a board of water commissioners had been created according to law, which seems by the papers to have been the case with LeRoy.

The next question which naturally arises in the consideration of the case is as to the effect, upon the proceedings attacked, of such noncompliance with the statute. It is claimed by the counsel who makes this motion that the court never acquired jurisdiction of the subject-matter of those proceedings, and that, therefore, they were and that the judgment entered upon them is void.

The failure to follow the statute, originally, furnished a complete defense at the time to the proceedings, if it had been invoked for that purpose.

The right conferred upon the water and light commissioners to acquire a lighting plant was not absolute, but was conditioned upon a previous popular vote, sanctioning and authorizing it.

"Permitting the voters of a municipality to decide upon questions of local interest or expediency such as that of supplying its own light and water seems to be conformable to those ideas of self-government and self-regulation by the people concerned which lie at the basis not only of our municipalities but of our institutions."

The trend of legislation, as evidenced by the Village Law now in force, is in accordance with this doctrine.

A sound public policy demands that constitutional and statutory provisions, designed to secure to and protect the people concerned in the enjoyment of such rights and privileges, shall be liberally construed in their favor. For that reason the popular vote pro-

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vided for in chapter 680 of the Laws of 1894, under which this proceeding was prosecuted, was a condition precedent to the right and power of the water and light commissioners to institute it; and for the same reason it was not competent for the village authorities to waive a compliance with the statute in that respect.

As between the parties to this proceeding, the doctrine of estoppel by recitals or allegations in the pleadings has no application.

The village of LeRoy, as distinguished from its agents and officials, the water and light commissioners and its trustees, is the real party in interest in this proceeding, which, for the purposes of this motion at any rate, is essentially the same proceeding that was instituted by the water and light commissioners; that is to say, it is the corporate rights that are involved, as distinguished from those of either the water and light commissioners or the trustees. They are each but agencies or instrumentalities used by the corporation for the transaction of its business, and, so far as this proceeding is concerned, the functions of the water and light commissioners ceased when the judgment of November 18, 1897, was entered, and thereupon the right to take steps to correct or set aside that judgment, if such a right exists, has devolved upon the municipality, which acts in such matters by and through its board of trustees, and, therefore, the corporation is properly in court upon this hearing. The motion to set aside the judgment being made therefor by the corporation through its board of trustees, and the corporation being the real party in interest, the motion is not a collateral but a direct attack upon the judgment and proceedings sought to be set aside. There is no controversy about the power of the village to acquire this lighting plant by proper proceedings in compliance with law. The claim is simply that, through inadvertence and mistake, a condition precedent to the right to exercise that power was not complied with, and that, by reason of that mistake, the village is unable in this proceeding to raise the money to pay for the plant in the only manner authorized by law. There is no dispute about the fact that anyone, taking the bonds proposed to be issued by the village, would take them with notice of the defect and would be estopped from claiming to be *bona fide* holders, within the line of cases which decide that such a holder may recover against the corporation where the statute confers upon the corporation or its agents the right to say that the popular vote required by law was not had, even though recitals to that effect were contained in the bond.

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It is claimed by the gas light company that the decree herein has been satisfied in part, and that, therefore, it cannot be set aside or vacated. The decree has certainly not been satisfied; it is a decree for the payment of money upon the performance of certain acts by the gas light company, none of which have been performed, nor has any part of the judgment been paid.

The possession of the property, sought to be condemned, has been delivered by the company and accepted by the village, but, if the village had no right or power to acquire the property in the absence of a popular vote sanctioning and authorizing it, as it had not, then the title thus acquired does not furnish the basis of a consideration for the bonds to be issued as contemplated by the statute, and the judgment ought not to stand.

The case is not within the doctrine of Matter of Woolsey, 95 N. Y. 135, and other cases which hold that constitutional and statutory provisions may be waived by persons for whose benefit they exist.

The case at bar does involve public policy, and is not exclusively a matter of private right. See Mayor v. Manhattan R. Co., 143 N. Y. 1; Matter of Cooper, 93 id. 507.

If it were competent for the constituted authorities of a municipality to waive a popular vote, enjoined by the Constitution or by statute, the only thing necessary to be done to render such provisions nugatory and meaningless would be to elect to office persons who, for one consideration or another, might find it expedient to waive a compliance with them.

The court had not jurisdiction to pronounce the judgment in question for the reason that the popular vote required by the statute was essential to confer it. As has been already said, it was a condition precedent to the right to prosecute the proceedings for condemnation, and that fact distinguishes this from the case of Hunt v. Hunt, 72 N. Y. 217, and others in line with it, involving the question of jurisdiction of the subject-matter of an action or proceeding.

The court has the power to set aside the judgment of November 18, 1897, and the proceedings upon which it is based (Black on Judgments, § 314; Code Civ. Pro., § 1283); and the facts and circumstances seem to demand that it be done, upon condition, however, that the village of LeRoy make full, complete and entire restitution to the LeRoy Gas Light Company.

Ordered accordingly.

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THE PEOPLE ex rel. RICHARD W. LARKIN, Relator, *v.* CARLOS A. HULL, as County Clerk of Genesee County, Respondent.

(Supreme Court, Erie Special Term, March, 1898.)

Liquor Tax Law — A special agent subpoenaed by a district attorney is entitled to full witness fees.

A special agent of the state excise department, appointed under the Liquor Tax Law (Laws of 1896, chap. 112), is not bound to take any part in the prosecution, by a district attorney, of an alleged violation of the statute; and, when duly subpoenaed to testify as a witness before the grand jury as to a violation which he has investigated, is entitled to his legal fees and the court will compel the proper county clerk to certify to the days of attendance and the number of miles traveled.

MOTION by the relator for a peremptory writ of mandamus.

J. M. Condon, for relator.

Safford E. North, for respondent.

WHITE, J. The relator is a special agent in the department of excise in this state, and the respondent is county clerk of Genesee county.

In the discharge of his duty, the relator investigated an alleged violation of the Liquor Tax Law in Genesee county, and made a complaint against the alleged offender, to the district attorney of that county, which complaint was presented by the district attorney to a grand jury.

The district attorney subpoenaed the relator at New York city to appear and testify as a witness before the grand jury, and pursuant to the subpoena the relator traveled from New York to Batavia for that purpose and testified before the grand jury. His fees, as such witness, if he is entitled to any, amount to $34.30, and it is the intention of the relator to pay over to the state of New York the amount of those fees if he shall receive them.

The relator requested the respondent to certify to the number of days he, the relator, attended before the grand jury and to the number of miles he had traveled to so attend, which the respondent refuses to do, upon the ground that the relator is not entitled to charge or receive fees or mileage as a witness for attendance before

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the grand jury, within the meaning of sections 609 and 616 of the Code of Criminal Procedure; the respondent's contention in that behalf being that the Liquor Tax Law imposes upon the relator, as a special agent of the excise department, the duty so to attend and testify, at the expense of that department.

It is understood to be the universal practice or custom now of counties to pay witnesses for the People who are not special agents in the excise department, situated as Larkin was, when subpoenaed by the district attorney of Genesee county, that is, witnesses who come from another county and travel a considerable distance to attend and testify before the grand jury, fees and mileage for so attending and testifying; and for the purposes of this case it is assumed that that practice or custom is warranted by section 616 of the Code of Criminal Procedure, and that the proceeding before the grand jury is the trial of a criminal action within the meaning of that provision of the statute. No objection to that construction of it is made by the respondent.

The refusal of the respondent, therefore, to give the certificate asked for by the relator, he having made proof of the fact of his attendance and the number of miles he traveled for that purpose in the manner prescribed by law, must be justified, if at all, by the Liquor Tax Law itself.

The object, sought to be attained by that law, is primarily to tax and regulate the traffic in liquors in such a manner as to insure uniformity in the application and enforcement of the Excise Law in place of a great diversity in those respects, which prevailed before its enactment by reason of sympathies and prejudices which existed in different localities and which, it is generally conceded, many times caused acts of favoritism and injustice on the part of the officials charged with its administration.

The only provisions contained in the Liquor Tax Law which can be said to bear upon the question presented for solution here, are found in sections 10, 35, 36, 37, 38 and 42.

Such provisions are, in substance, that special agents shall be appointed by the state commissioner, that they shall receive a salary of $1,200 a year, payable in monthly installments, together with such necessary expenses as they may incur by direction of the state commissioner in the performance of the duties of their office.

The relations between the commissioner and those agents are made confidential by the statute, and they are required, under his direction, to *investigate* all matters relating to the collection of

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liquor taxes and penalties under the act, and in relation to the compliance with law by persons engaged in the traffic in liquors; they may also investigate other matters in connection with the sale of liquor, and, with certain county and municipal officers, are required to notify district attorneys of violations of the statute which may come to their knowledge; that the offense investigated by the special agent, as far as we are now interested in that question, shall be prosecuted by indictment by a grand jury of the county in which the crime was committed, and all fines and costs imposed and penalties recovered by civil actions are to be paid, in the first instance, to the treasurer of the county where the offender is prosecuted and convicted, or penalties are collected, and are then apportioned and divided between the state and county as provided by the law.

Criminal actions are, generally speaking, local, and the expenses thereof are borne by the counties where they are tried. There is no provision either in the Liquor Tax Law or any other statute, imposing upon special agents of the excise department any duty or obligation to appear as witnesses before grand juries or at all, otherwise than under and by virtue of subpoenas. In that respect they are situated precisely like other witnesses and are compelled to so attend and testify in the same manner. I am of the opinion that, if the legislature had intended to place such an obligation upon such special agents, the law would have so provided.

There is an entire absence of statutory law making it a duty of a special agent to take any part in the prosecution of violations of the Liquor Tax Law, after he shall have investigated the matter and made a report to the district attorney. In that respect the duty of a special agent is exactly the same as that of other county and municipal officers, as has already been said. The only officer or person competent to enforce the law by criminal action is the district attorney.

The fact that the relator, by his original investigation and report of the Petrie case, thereby made himself an indispensable witness for the People; or that he now *understands* that he is obliged to turn over to the state the fees, if any, which he may receive, does not seem to me to be relevant to this discussion. There seems to be no basis for such an understanding, and, therefore, it is but an erroneous conception of the law.

Of course, if, as the respondent contends, the state or excise department has paid the expenses of the relator in going to Batavia

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from New York to testify, and the county is required to pay the same expense to the relator, he will receive a double payment of those expenses; but, as I construe the law, that is not the case. The expense of a witness once paid by the county to the witness, should not, and, it is assumed, will not, be again paid to him by the state or by the excise department. The *expense* incurred and paid by a witness in such a case is not such as section 10 of the Liquor Tax Law provides for, because it is not an expense incurred by direction of the state commissioner, within the meaning of that section of the statute.

The state commissioner not only does not direct or command the special agent to appear and testify before the grand jury but would have no right or authority to do or to interfere in any way to prevent an exact and prompt obedience to a subpoena served upon a special agent in such a case.

The right to a fee for attendance is given expressly by statute to all witnesses alike who attend and testify before a grand jury.

In my opinion the writ asked for should be granted.

Writ granted.

THE CLINTON METALIC PAINT CO., Plaintiff, *v.* THE NEW YORK METALIC PAINT CO., Defendant.

(Supreme Court, Kings Special Term, March, 1898.)

1. **Trade-marks — Common products.**

The terms, "Clinton Hematite Red" and "Metalic Clinton Paint," indicate a paint pigment made from hematite ore, found near the village of Clinton, New York, and cannot be exclusively appropriated as a trade mark.

2. **Same — Exclusiveness.**

A trade mark may be wholly exclusive or of a lesser degree of exclusiveness.

3. **Same — Combinations of words, figures or symbols.**

A combination of words and figures or symbols may constitute a trade mark, although some or each of the parts standing alone would not do so, and could be used without infringement; and in such a case it is the entire combination and setting which makes the trade mark.

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4. Same — Barrels and boxes — Devices of them as labels.

Actual barrels, boxes and the like cannot be appropriated for trade marks, because of their particular size, style or shape; but this has reference only to the physical objects themselves, and not to pictures or devices of them made for labels or brands.

5. Same — Words indicating kind, etc.

Words or names which describe the product or ware to which they are applied, by indicating its kind, quality or ingredients, cannot be exclusively appropriated as trade marks therefor; nor can words belonging to the common stock of words be so exclusively appropriated.

6. Same — Name of a place or country.

The name of a place or country cannot be exclusively appropriated for a trade mark for a product or ware of such place or country, as against one offering for sale a similar product or ware of the same place or country, and is only good against one using it for a product or ware not of such place or country. If it be used arbitrarily or fancifully, it is only good against one using it in the same way, and not against one using it truthfully, namely, in its actual meaning.

7. Same — Intention — Fraud.

The intention of the defendant is not material on the question of granting relief by injunction against an infringement of a trade mark and fraud is only material on the question of damages.

THESE two suits are brought to enjoin defendant from using two alleged trade marks of the plaintiff.

The plaintiff was incorporated in 1886, and has ever since been manufacturing in the township of Kirkland, N. Y., near the village of Clinton, in the said town, a red pigment for coloring mortar, brick, tile and all clay products. It makes such pigment out of iron ore which it mines in the same place. The process of manufacture is to pass the ore through a gang of crushing, rolling and grinding machines, until it finally comes out a fine powder. While the ore is going through the grinding machines, another material, which is a trade secret and not disclosed, is added. The same or a similar product from such iron ore mined in the said section, was manufactured and sold before the plaintiff engaged in such manufacture. Many persons are engaged in such manufacture. Such iron ore is found in a district near the said village of Clinton. It is a hematite, or blood red ore, as that word signifies. It is peculiar to that district, and some others in this country, and is geologically known as Clinton hematite, or Clinton ore, wherever found, having

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been so named for De Witt Clinton. In 1887 the plaintiff adopted a label for its said product, consisting of the perspective representation of a barrel with the head toward the observer, showing the lines of the staves and of the slats of the head, and bearing the name or brand, "Clinton Hematite Red", printed in the centre of the said barrel head, each word being under the preceding one. The label is reddish in color, except that the letters and lines, and part of the sides of the barrel, are white. This label is pasted on each box or barrel in which the product is sold by the plaintiff, and the plaintiff has identified its product therewith, and created a large and valuable trade thereunder. In June, 1897, the defendant company was incorporated, and it has ever since been manufacturing and selling a pigment of the same kind. Its manufactory is in Brooklyn, N. Y., but the ore it uses in such manufacture is mined for it in the said Clinton district, and is the said Clinton hematite or red ore peculiar to that district. It is advertising and using upon its boxes and barrels, as its own, a label in color, figure, form, arrangement and all, like that of the plaintiff. This is being done by the defendant for the purpose of causing the customers of the plaintiff in particular, and all others, to confound the defendant's product with that of the plaintiff, and thereby enable it to get the trade of the plaintiff, and it has extensively done so.

The plaintiff during the same time has manufactured the said pigment out of the said ore, without adding the said secret material in the process, and has sold the same under the same label, except that the words "Metalic Clinton Paint" appear thereon in the place of the said other words. This latter pigment is sold to be prepared as paint by being ground in oil. The defendant is also manufacturing the latter kind of pigment, made of the said hematite ore from the said Clinton district, and is in the same way advertising and selling it, as aforesaid, under the plaintiff's said last-mentioned label.

Charles E. Mitchell and Henry M. Brigham, for plaintiff.

Robert H. Wilson, for defendant.

GAYNOR J.: It is often the case that a combination of words and figures or symbols will constitute a trade mark, although some or each of the particular parts of the combination, standing alone,

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would not constitute a trade mark, and could be used without infringement. In such a case it is the entire combination and setting which makes the trade mark (Fischer v. Blank, 138 N. Y. 244). This principle applies to the present case. The words "Clinton Hematite Red", and "Metalic Clinton Paint", in the particular combination, setting and surroundings in which the plaintiff has placed them, are parts of a lawful trade mark, and may not be used by the defendant in the same resemblance, or in any resemblance that would mislead a casual purchaser of ordinary observation. The particular representation of a barrel adopted by the plaintiff, is lawful and exclusive. Actual barrels, boxes, and the like, may not be appropriated for trade marks for their particular size, style or shape; but this has reference only to the physical objects themselves, and not to pictures or devices of them for labels or brands (Moorman v. Hoge, 2 Sawyer, 78; Enoch Morgan's Sons v, Troxell, 89 N. Y. 292; Fischer v. Blank, 138 N. Y. 244; Browne on Tr. M. sec. 138). The cases sometimes cited to the contrary are not so in fact, covering as they do combinations of package, color, and label (Cox's Manual Tr. M. Cases, index "Packages"). The defendant is using an almost precise imitation of the plaintiff's combination trade mark, and must be restrained therefrom, or from using any other harmful imitation.

But the court may not go further, and, singling out the said words, absolutely prohibit their use by the defendant in any way whatever. I do not see that the name "Clinton Hematite Red" may be exclusively appropriated by the plaintiff for its product. It is nothing but the obvious and correct name of such product, It is descriptive of such product, and discloses of what it is made. Words or names which describe the product or ware to which they are applied, by indicating its kind, quality or ingredients, may not be exclusively appropriated as a trade mark therefor. If they show forth these facts, they are not saved by also showing the particular origin, production or ownership of the thing. The office of a trade mark is to show this latter only, and if it shows the former also, it is not maintainable against those who can truthfully use it to describe or name their similar article. Words of the common stock of words, expressive of a fact or facts, may be used by any one for that purpose. No one may take them to his exclusive use to mark his product or ware, against one by whom they are being truthfully used to inform the public of the kind, character or composition of his similar product or ware. As all per-

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sons have the right to produce and vend similar articles, it follows that they have the right to use any words, general or scientific, to describe them (Caswell v. Davis, 58 N. Y. 223; Taylor v. Gillies, 59 N. Y. 331; Popham v. Cole, 66 N. Y. 69; Hier v. Abrahams, 82 N. Y. 519; Van Beil v. Prescott, 82 N. Y. 630; Selchow v. Baker, 93 N. Y. 59; Royal B. P. Co. v. Sherrell, 93 N. Y. 331; Waterman v. Shipman, 130 N. Y. 301; Keasbey v. Brooklyn Chemical Works, 142 N. Y. 467; Rogers v. Rogers, 11 Fed Rep. 495; Del. & H. C. Co. v. Clark, 13 Wall. 311; Cox's Manual, 536; "Linoleum"). In *Caswell* v. *Davis*, the name "Ferro-Phosphorated Elixir of Calisaya Bark" was not upheld as a trade mark, for the reason that it disclosed the ingredients, and was therefore descriptive of the article. In *Keasbey* v. *Brooklyn Chemical Works*, the name "Bromo-Caffeine" was upheld, as at most the word "bromo" only suggested "that some one among the hundreds of substances that bromine may combine with" was used, and that was deemed too indefinite to be descriptive of the actual ingredient. Clinton hematite is a red iron ore mined near Clinton, N. Y., and well known in commerce and geology by that name. By rendering it into a fine powder, a well known article of commerce, used to color mortar and clay products, and to make paint, has been produced longer than the plaintiff has been engaged in its production; and many are engaged in the same business. The words "Clinton Hematite Red" simply express what such article of commerce is. They therefore cannot be appropriated by the plaintiff against another manufacturer of such article, though they might be against one palming off some false article under them. And the same is the case of the name "Metalic Clinton Paint." The words "Metalic Paint" are obviously generic and descriptive (Prince Mfg. Co. v. Prince Metalic Paint Co., 135 N. Y. p. 33). The word "Clinton" is of the name of the metal itself, and is also the name of the village near which it is mined, and for both these reasons it is applied to the mine district. Both names are as descriptive and truthful as used by the defendant as they are as used by the plaintiff, for each makes a similar article out of the said Clinton metalic ore. That the plaintiff adds some secret material to one of its products cannot enable it to exclusively appropriate the name of the principal material.

It can make no difference that the plaintiff manufactures near the said village of Clinton, and in or near the said mine district,

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while the defendant manufactures in Brooklyn. The essential thing is that they both use the said Clinton ore to make their products, and it is that which the names in dispute are meant to and do express to the trade. Moreover, the word "Clinton", as the actual name of the said village, or the colloquial name of the said mine district, cannot be taken by the plaintiff for an exclusive trade mark. It is not quite true to state the rule to be that the name of a place or country may not be appropriated for a trade mark. It may be so appropriated, but not exclusively. A trade mark may be wholly exclusive, or of any lesser degree of exclusiveness. The prior appropriation of the name of a place or country for a product or ware of that place or country, is not good against another offering for sale a similar product or ware of the same place or country. Such prior appropriation is good against one using said name for a product or ware not of such place or country. Such a name may also be exclusively appropriated as a mere arbitrary or fanciful name for an article generally known not to be of such place or country, and not represented to be such, against every person subsequently offering a similar article, except such article be of such place or country. One so using such a name arbitrarily or fancifully may only have another restrained from using it in the same way, but not from using it truthfully, viz., in its actual meaning (Newman v. Alvord, 51 N. Y. 189; Brooklyn White Lead Co. v. Masury, 25 Barb. 416; Lea v. Wolf, 13 Abb. Pr. (n. s.) 389; on appeal, 15 Abb. Pr. (n. s.) 1; Wolfe v. Goulard, 18 How. Pr. 64; Fleischmann v. Schuckmann, 62 How. Pr. 92; Browne on Tr. M. sec. 191; Del. & H. C. Co. v. Clark, 13 Wall. 311; Columbia Mill Co. v. Alcorn, 150 U. S. 460). The rule thus stated in its details is seen to exclude the plaintiff from any exclusive right in the local name of Clinton as against the defendant. I have not failed to scrutinize again the leading English case usually cited to the contrary (McAndrew v. Bassett, 10 Jur. (n. s.) 492 and 550). It upholds as exclusive the word "Anatolia" stamped on liquorice sticks made of the juice of liquorice roots from the province of Anatolia in Turkey. The decision was not put upon the tenable ground that the defendant was falsely using the word for liquorice made of juice not from Anatolia, which was the fact (see purchaser's order in statement of case, p. 492), but upon the broad ground that the plaintiff for having first used it had an exclusive right to it. (See 13 Wall., *supra*, at p. 326). It is not in harmony with the decisions in this country, or on the continent

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of Europe, and does not seem to have a precision of statement which brings out any principle which was followed in the decision of it. The "Glenfield Starch," "Stone Ale" and "Seixo Wine" cases (Wotherspoon v. Currie, H. L. 5 L. R. 508; Thompson v. Montgomery, 41 L. R. Ch. Div. 35; Seixo v. Provezende, 12 Jur. (n. s.) 215), are, I suppose, reconcilable with the restricted principle (if such principle be established with us), that when it is found as a fact that a generic or descriptive name has by long and unquestioned exclusive appropriation and use by an individual for a certain article of commerce, lost its general and usual significance as so used, and acquired in connection with such article a secondary sense, by becoming only the trade designation thereof, and indicating to the public nothing but its particular origin, production or ownership, a trade mark therein may be upheld on that ground.

And the intention of the defendant here is immaterial. If the plaintiff has no exclusive right to the words in question as a trade mark, fraud cannot be predicated upon their use by the defendant. It is often repeated that equity takes jurisdiction of trade mark infringements under the head or on the ground of fraud, and there are some *dicta* that such jurisdiction will be taken when there is fraud where it would not be taken in the absence of fraud. This seems not to be at all so. Equity gives relief by injunction in such cases regardless of the intention of the defendant. Even though his infringement be wholly honest, equity will restrain its continuance. If the resemblance to a trade mark be such as to mislead persons of ordinary observation, not upon a comparison, but upon casual sight of the imitation, equity gives relief by injunction. The infringement may or may not be a fraud, but in either case the relief is based on the infringement. The jurisdiction of equity in such cases rests not upon fraud, but upon the impossibility, shown by experience, of getting adequate redress in damages at law. It is also said in some cases to be based on imposition practiced upon the public by such infringements, but this seems rather fanciful. The only redress for a trade mark infringement was at first by an action in a common law court for damages for deceit. We find such an action upheld as early as 1590 (reported in *Southern* v. *How*, Popham, 144), whereas we find the court of chancery refusing its jurisdiction to a bill for an injunction to restrain such an infringement as late as 1742 (Blanchard v. Hill, 2 Atk. 484). But chancery finally came to entertain bills to restrain such infringements, and the

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plaintiff having established in such a suit his right to that relief, his damages were assessed therein also. The declaration or complaint in the common law action was for damages for deceit or fraud, and the damages in chancery were assessed upon the same principle, no damages being given unless there was fraud. From this dual aspect in which such suits were presented to chancery, it came to be inadvertently said once, and then occasionally, that the relief by injunction was based upon fraud also; and this is found to have now and again been repeated down to date. But if the line of cases be carefully examined with an eye to this matter from the beginning, it will be readily seen that the question of intention, or of fraud, has to do only with the damages to be assessed, and not with the question of relief by injunction (Edelsten v. Edelsten, 1 De Gex, & J. & S. 185; Cox's Manual Tr. M. cases, index "Fraudulent"; Singer Co. v. Wilson, 2 Ch. Div. 434 and 448; H. L. 3 App. Cas. 376; Colman v. Crump, 70 N. Y. 573; Hier v. Abrahams, 82 N. Y. 519; T. A. Vulcan v. Myers, 139 N. Y. 364).

Judgment for the plaintiff accordingly.

Judgment accordingly.

JAMES J. BENNETT, Plaintiff, *v.* FRANK KOVARICK, Defendant.

(Supreme Court, Suffolk Trial Term, March, 1898.)

1. **Ejectment — Proof of right to possession.**

Actual occupation, by the mesne grantor of the plaintiff in an action of ejectment, of a part of a tract of woodland under an absolute conveyance, when accompanied by acts of dominion in cultivating the cleared land and in cutting timber from the woodland, sufficiently establish a legal right of possession.

2. **Same — Assessment of an individual tract containing numbered full lots.**

The failure of assessors to comply with the statutory requirement (1 R. S., pt. 1, chap. 13, tit. 2, art. 2, § 12), that they designate, upon their roll, a subdivided tract by its name and each full lot by its number and that they set down opposite the number of each lot, in the second and third columns of the roll, respectively, the quantity of land in the lot liable to taxation and its valuation, is a fatal defect and a tax purchaser of one of the lots acquires no title by the sale.

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3. Same — Failure of mortgagee to file a notice of his mortgage, in order to redeem from a tax sale.

Where an assessment for taxes is invalid, the rights of a mortgagee, under whom a plaintiff in ejectment claims, are not affected by his failure to file a notice and description of his mortgage in the manner provided by section 1 of chapter 280 of the Laws of 1870, a proceeding made requisite by the statute in order to redeem from a tax sale.

4. Same — Special statute as to effect of a county treasurer's deed — Repeal by implication.

Where an unrepealed special statute (Laws of 1873, chap. 620, § 9, as amended by Laws of 1875, chap. 80) declares that the deed of a particular county treasurer shall be merely presumptive evidence of the fact that the proceedings prior to the tax sale were regular, the provisions of the Tax Law (Laws of 1896, chap. 908, § 132) declaring such a deed to be conclusive evidence of that fact, are inapplicable, as the two statutes are independent, and a repeal by implication is not favored.

TRIAL of an action of ejectment without a jury.

T. F. Neville & T. M. Griffing, for plaintiff.

W. H. Jaycox, for defendant.

MADDOX, J. This is an action of ejectment, plaintiff seeking to recover possession of lots 11 and 12 in block 11 on sheet 3 of "Map of property at Wellwood, Long Island, on South Side railroad," made by J. Sammis, surveyor, in 1869, which formed part of the woodland embraced in the tract of about 400 acres of land conveyed by Jones, as trustee, to Hannah H. Hone, by deed bearing date December 8, 1857, and recorded May 30, 1862, and plaintiff claims title through mesne conveyances.

The deed to Hone was an absolute conveyance and constituted color of title. 3 Am. & Eng. Ency. of Law, 276; Thompson v. Burhans, 61 N. Y. 60.

The tract conveyed was known as the "Hone farm," and she resided on it. It was not inclosed, and the actual occupation of a part was constructive possession of the balance of the grant.

The actual occupancy by Hone, by her son-in-law, Anthony, and by her grantee Wellwood, their acts of dominion and of ownership, viz., residence thereon, cultivation of the cleared land and the cutting, from various parts of the woodland, including that

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part embracing the lots in question, of timber for firewood, for use upon the farm and for sale, were all open, visible and notorious and continued until the plotting of the tract into lots by Wellwood and the making of the aforesaid map in 1869. Then followed the laying out of streets, the staking out of lots, the erection of houses and sales of lots by Wellwood until the conveyance to Schleier in 1879, and the continuance of possession by Schleier is presumed up to the time of the conveyance, under the mortgage foreclosure, to this plaintiff.

Such actual, visible, notorious and continuous occupation and use of land, under color of title, is sufficient to establish a legal right of possession, a seizin. Miller v. L. I. R. R. Co., 71 N. Y. 384.

Defendant is in the occupancy of said two lots, claiming title under a deed, dated March 24, 1893, and recorded in the Suffolk county clerk's office, in which county said lands are situated on April 15, 1893, from the county treasurer of that county, conveying (§§ 4, 5, chap. 620, Laws of 1873, as amended by chap. 80, Laws of 1875), after a sale, in March, 1891, for unpaid taxes for the year 1889, land "Situate in the town of Breslau, County of Suffolk, viz.: 2 lots 11 and 12, Block 11, Sheet 3;" and it appears that the lots so sold and conveyed had been entered and assessed upon the "assessment-roll of the town of Babylon, Suffolk county, N. Y., for the year 1889. Nonresident property (of lots) owners unknown," as one plot or parcel, *i. e.*, "2 Lot, 11, 12, Bk. 11, St. 3."

It is in evidence that there are three other maps of property in that vicinity known as sheets 3, but it does not appear that there are on any of such maps lots bearing and having the same designations as the two in question, viz., 11 and 12 in block 11, sheet 3, nor was it shown that there is upon such assessment-roll, any other entry of lots having those distinguishing numbers, and this case has been presented by counsel upon the theory that the land in dispute is the same as that so entered upon the assessment-roll and afterwards sold and conveyed to the defendant.

As the premises in question were full lots, having each a distinguishing number and embraced in a subdivided tract, it was the duty of the assessors to designate the tract by its name, the lots by their respective numbers, and opposite the number of each lot to set down in the second and third columns of said roll, first: the quantity of land in such lot liable to taxation and, in the third, the valuation thereof. R. S., part 1, chap. 13, tit. 2, art. 2, § 12.

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This has not been done and such failure to comply with the plain requirements of the statute rendered the assessment void. They were fatal omissions. Tallman v. White, 2 N. Y. 70; Zink v. McManus, 121 id. 265; Matter of N. Y. C. & H. R. R. R. Co., 90 id. 349; May v. Traphagen, 139 id. 478.

Defendant contends that his title is valid and effectual as against the plaintiff, because of the failure to file the notice and description of the mortgage to Whiton and Smith, as provided by section 1, chapter 280, Laws of 1870, since it is through the foreclosure of that mortgage plaintiff traces his title.

To this proposition I cannot give assent, for, as appears above, the assessment was invalid and hence the mortgagee's rights were not divested and the lien of the mortgage remained undisturbed. Cromwell v. MacLean, 123 N. Y. 485.

Defendant also urges that the county treasurer's deed to him, having been recorded more than two years, has, pursuant to section 132 of the "Tax Law" (chapter 908, Laws of 1896), become "conclusive evidence that the sale and the proceedings prior thereto, from and including the assessment of the lands * * * were regular."

Nor can this contention be sustained, since the special statute, chapter 620, Laws of 1873, as amended by chapter 80, Laws of 1875, relating to that county, section 9 of which provides that the "conveyance shall be conclusive evidence that the sale was regular and also presumptive evidence that all the previous proceedings were regular" has not been repealed, and the rule of construction that a special statute is not repealed by a general act, unless the intention to repeal is manifest, applies. Buffalo Cem. Assn. v. City of Buffalo, 118 N. Y. 66; Weiler v. Nembach, 114 id. 39.

The fact that the act of 1873 is not included among the repealed laws enumerated in the schedule annexed to the act of 1896 may well be referred to as negativing any legislative intent to repeal the same. It will be seen that the act of 1873 makes the conveyance conclusive evidence of the regularity of the sale and presumptive evidence only of the regularity of the prior proceedings, and the general act of 1896 cannot be referred to for the purpose of removing that limitation nor of extending or enlarging the prescribed effect of a conveyance given pursuant to the provision of the act of 1873 as amended.

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The two statutes can and must stand alone and separate. The later act, that of 1896, is not amendatory of the former.

There was no valid assessment of the lots in question, no title was conveyed by the deed to the defendant, and hence the act of 1896, section 132, even if it applied here, would not have the legalizing effect contended for by the defendant. Cromwell v. MacLean, 123 N. Y. 489; Ne-ha-sa-ne Park Assn v. Lloyd, 7 App. Div. 365.

Judgment is, therefore, directed for plaintiff with six cents damages, since no proof of damage was introduced.

Judgment for plaintiff.

LEON MARGULIES, Plaintiff, *v.* WALTER DAMROSCH, Defendant.

(Supreme Court, New York Special Term, March, 1898.)

1. **Costs — Taxation.**

Where an order of the Appellate Division grants specific motion costs, no taxation is necessary; but where it grants costs to be taxed, they are taxable by the clerk of the Supreme Court.

2. **Same — Effect of a failure to pay motion costs of an appeal.**

Semble, **that the failure of the plaintiff to pay, in ten days from the service of a copy of the order, costs imposed by the Appellate Division upon its reversal of an order denying the defendant's motion for a commission to take testimony, operates, under section 779 of the Code of Civil Procedure, as a stay of the plaintiff's proceedings; but, in any event, the Supreme Court will not settle the interrogatories and cross-interrogatories until a disposition has been made of the question of costs.**

MOTION for a retaxation of costs.

Louis Hicks, for plaintiff.

Julius Lehmann, for defendant.

FREEDMAN, J. The order of the Appellate Division, dated January 21, 1898, denying plaintiff's motion for a reargument, imposes $10 costs upon the plaintiff. No disbursements were granted. *The order* contains no authority to the clerk to tax the costs and *none was* necessary. The order is sufficient in itself.

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The order of the Appellate Division, dated December 31, 1897, reverses the order denying the defendant's motion for a commission with $10 costs and disbursements to be taxed by the clerk of this court. This required a taxation, and the clerk was designated as the taxing officer. Outside of the power thus conferred, the clerk had no authority. The clerk referred to was the clerk of the Supreme Court, and not the clerk of the Appellate Division thereof. According to the true intent and meaning of the order and the usual practice the taxation properly took place before the county clerk who is the clerk of the Supreme Court.

It then remains to be seen whether any error was committed in the taxation.

The clerk, in making the taxation under the order of December 31, 1897, erred by allowing the $10 allowed as costs granted by the Appellate Division in the order of January 21, 1898, denying plaintiff's motion for a reargument, because they required no taxation and were enforcible as an independent item.

He also erred by allowing a number of items as necessary disbursements on the reargument, because they were incurred subsequently; and, presumably, were compensated for by the order of January 21, 1898, which allowed $10 costs, but no disbursements.

The taxation must, therefore, be set aside and a new taxation ordered by the clerk upon such papers as both parties may see fit to place before him, and upon such new taxation only such items should be allowed as are shown to have been costs and necessary disbursements within the meaning of the order of the Appellate Division of December 31, 1897.

Inasmuch as, according to the admissions contained in the affidavit of plaintiff's attorney, a copy of the order of December 31, 1897, was served on him on January 18, 1898, and a copy of the order of January 21, 1898, was served on him January 28, 1898, and the costs and disbursements granted by said orders have not been paid, although plaintiff's attorney tendered the $10 costs imposed by the second order, the next inquiry is whether the nonpayment of the costs and disbursements imposed by the order of December 31, 1897, operated, under section 779 of the Code of Civil Procedure, as a stay of plaintiff's proceedings after the expiration of ten days after the service of a copy of said order. That section does not apply to motion costs only. In 1884 it was amended so as to cover any other sum of money directed by an order to be paid. This seems broad enough to cover the case at bar.

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But even if this were otherwise, the case is one in which the court, in the exercise of its inherent power, should, on defendant's motion, postpone the settlement of the interrogatories and cross-interrogatories until the question of costs, etc., has been disposed of. I shall, therefore, refrain from settling the interrogatories and cross-interrogatories.

After the retaxation of the costs and disbursements hereby ordered to be retaxed and payment of all costs and disbursements then in arrears, the plaintiff may again move for a settlement of the interrogatories and cross-interrogatories.

Ordered accordingly.

JOHN MADDEN, Plaintiff, *v.* ANNA J. LENNON et al., Defendants.

(Supreme Court, New York Special Term, March, 1898.)

1. **Mechanic's lien — Discharge of notice of lis pendens.**

The Supreme Court has no general power to discharge a notice of lis pendens filed in an action brought to foreclose a mechanic's lien; and such a motion must not only be made upon notice, but the moving party must bring the case within the terms of section 1674 of the Code of Civil Procedure and, among other things, must show that the time to appeal from the judgment has expired.

2. **Same — Discharge of lien.**

A mechanic's lien can be discharged only in accordance with the provisions of chapter 418 of the Laws of 1897, and those of section 3417 of the Code of Civil Procedure, as amended by chapter 419 of the Laws of 1897.

MOTION to cancel a notice of *lis pendens* filed in an action to foreclose a mechanic's lien.

Earley & Prendergast, for plaintiff.

James, Schell, Elkus & McGuire, for Anna J. Lennon.

FREEDMAN, J. The court is not authorized, on a motion, to cancel a notice of the pendency of an action, properly filed, unless the moving party presents a case authorizing the cancellation within the terms of section 1674 of the Code of Civil Procedure. Beman v. Todd, 124 N. Y. 114.

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There is no general power to discharge a notice of *lis pendens*, filed in a mechanic's lien case. Breen v. Lennon, 10 App. Div. 36.

Under the section referred to, the defendant in the case at bar was bound to show that the time to appeal from the judgment had expired. No such proof was given, and in fact the time to appeal had not expired and an appeal has since been taken. Moreover under that section the application should have been made on notice.

The *ex parte* order of March 1, 1898, is, therefore, clearly wrong in so far as it vacated the notice of the pendency of the action. In so far as it discharged the mechanic's lien, a further question arises. Here again the statute directs in what cases the lien may be discharged. Sections 18 and 19 of the Lien Act of 1897 (chap. 418) prescribe the cases in which this may be done, and an additional provision will be found in section 3417 of the Code of Civil Procedure as enacted by chapter 419 of the Laws of 1897. The discharge of the mechanic's lien in question was not authorized by anything contained in these statutory provisions.

Moreover in the case at bar, the rights of the plaintiff, under his notice of the pendency of the action, are so interwoven with his rights under the mechanic's lien filed, that, even if there were inherent power in the court to discharge the mechanic's lien independently of all statutory provisions, such an order should not be granted as long as the notice of the pendency of the action cannot be canceled.

The order of March 1, 1898, must be vacated and set aside and the clerk directed to reinstate, by proper entry, the notice of the pendency of the action and the lien. But the order to that effect should not be directed to be entered *nunc pro tunc*.

Ordered accordingly.

ELIZA CULLEN, Plaintiff, *v.* WILLIAM CULLEN, Defendant.

(Supreme Court, New York Special Term, March, 1898.)

Decree for a separation — Alimony — Prior adjudication.

Where the Court of Appeals has declared, upon the criminal prosecution of a husband as a disorerly person for his failure to support his wife, that she has, under a decree of separation which was considered upon the appeal, a right to apply for alimony upon proof of a change in her husband's circumstances and that that right "is open to her

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still," the Supreme Court must accept the statement as controlling in the civil action, and, upon proof of a change in the husband's circumstances will award her alimony, having regard, however, to the fact that the criminal prosecution proved to be groundless, and involved the husband in expense.

MOTION for alimony.

George W. Dease, for motion.

Merrill & Rogers, opposed.

FREEDMAN, J. In the course of the opinion delivered by O'Brien, J., in People ex rel. Comrs. of Charities, v. Cullen, 153 N. Y. 629, it was emphatically declared that, under the decree of separation in this action, the remedy of applying for alimony in view of the change of the pecuniary circumstances of the defendant "has always been open to the wife and is open to her still." I do not feel at liberty to disregard that emphatic declaration as *obiter dictum*.

The attention of the court was, by the brief of the counsel for Mr. Cullen, directed to the decree of 1883 and it was claimed that the obligation of the husband to support the wife was terminated by that decree. The attention of the court was also directed to the decisions in Erkenbrach v. Erkenbrach, 96 N. Y. 456, and Kamp v. Kamp, 59 id. 212. Notwithstanding the points thus urged, it was said that the remedy of applying for alimony, upon proof of a change in the pecuniary circumstances of the defendant, has always been open to the wife and is open to her still. That statement undoubtedly was made in view of the provision of the decree, permitting such an application to be made upon proof of a change in the pecuniary circumstances of the defendant.

I feel, therefore, bound to accept the statement referred to as the law applicable to the case at bar, although it may be difficult to reconcile it with the more recent decision of the Court of Appeals in Walker v. Walker, 155 N. Y. 77.

The question then remains whether a case has now been presented which calls for an award of alimony.

It appears, as it appeared before the Court of Appeals, that the age and physical condition of the defendant are such as to render him incapable of earning anything towards the support of his wife,

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from whom he has been separated for about thirty years. The proof, however, establishes that he has some real property, none of which he can sell or mortgage because of the plaintiff's contingent right of dower, and which is in a dilapidated condition. His income from it does not exceed $1,000 a year, and most of it, if not all, is needed for his own support. Upon a consideration of all the circumstances disclosed, and especially in view of the expense to which he was unjustly put by the institution of groundless criminal proceedings against him, I am of the opinion that the alimony to be awarded should not exceed three dollars per week from the service of the order to be entered hereon.

Plaintiff's motion is granted to that extent.

Motion granted.

MAICHO FORTUNATO, Plaintiff, *v.* THE MAYOR, ETC., OF THE CITY OF NEW YORK et al., Defendants.

(Supreme Court, New York Special Term, March, 1898.)

Referee — Removal for bias.

A referee's report, made in an action to which the city of New York is a party, will not be set aside upon mere proof that the referee, an attorney well known to have had great experience and knowledge of the laws relative to the city and who had frequently been retained by it as counsel, had, during the pendency of the reference, been retained as special counsel for it in certain cases wholly unrelated to the one referred and that he had also been retained in another city case before the reference was directed, as the court cannot, in the absence of proof, assume that his action as referee will be affected by such retainers.

MOTION to set aside a referee's report and the judgment entered thereon.

C. J. G. Hall, for motion.

John Whalen (Theodore Connoly, of counsel), for Mayor, etc.

Deyo, Duer & Bauerdorf, opposed.

FREEDMAN, J. This is a motion made by the defendant, Helen A. Dawson, administratrix, etc., to set aside a referee's report and the judgment entered thereon.

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The questions litigated before the referee were as to the amount due from the city, if any, upon a contract between the city and John F. Dawson for regulating and grading Edgecomb avenue, and to whom that money, if any was due, should be paid. Dawson had assigned the moneys coming due on the contract to two different parties, viz.: the Twelfth Ward Bank and Thomas Patten, for the repayment of moneys borrowed by Dawson from both.

The final estimate did not show enough money to satisfy both claims, but Dawson made an additional claim for extra work. If this claim for extra work had been allowed, there would be sufficient money to pay substantially both the bank and Patten, and the litigation between the bank and the Patten estate, each claiming priority, would soon be ended. Both the bank and the Patten estate, therefore, sought to have Dawson's claim for extra work against the city allowed, and while each claimed priority as against the other, they both desired this additional sum to fall back upon.

The referee decided adversely to the bank, in favor of Patten's estate, and against Dawson's claim for extra work. After the report had been filed and judgment had been entered thereon, the bank and Dawson's estate appealed. After that, it is claimed, it was discovered by the attorney and counsel of the estate of Dawson, that during the pendency of the reference before him the referee, Thomas Allison, Esq., had accepted retainers as counsel from the defendant, the city, in several proceedings. This is claimed to have been legal misconduct in the referee, for which his report and the judgment entered thereon should be set aside, and the present motion is made by Helen A. Dawson, as administratrix, etc., for that purpose.

It is undoubtedly true that references have been set aside on very slight proof of improper relations between the referee and the adverse party, and it may be conceded that the court should be swift in doing so, where but one inference can arise from the retainer of the referee and such inference makes it apparent that harm might have come to the moving party by reason of the relations between the adverse party and the referee. Stebbins v. Brown, 65 Barb. 272, is a leading authority upon that point.

But in the case at bar an exceptional state of facts has been presented.

Mr. Thomas Allison has long been known and treated by the profession as a lawyer possessing special knowledge of all laws relating to the city and county of New York and of the various de-

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partments thereof and having vast practical experience in important litigations in which the city has been engaged.

As a consequence thereof he has during the last twenty years been retained as special counsel not only for the city, but also and more frequently against the city.

Moreover during the same period he was, in view of his exceptional qualifications in that respect, frequently selected by the consent of all parties interested to act as referee in litigations involving questions under the laws applicable to the city and county of New York.

These facts are well known throughout the legal profession, and the attorney and counsel for the moving party must have been well aware of their existence in general, and yet with such knowledge he consented to the appointment of Mr. Allison as referee.

The claim is made, however, by said attorney and counsel, that, since the filing of the referee's report, he discovered for the first time that during the pendency of the reference, Mr. Allison acted as special counsel for the city in five school site cases and in the case commonly known as the Speedway case. That Mr. Allison so acted is conceded. In the school site cases he was retained during the pendency of the reference. In the Speedway case he was retained years before the reference. Assuming then that the discovery of these particular facts did not occur before the time alleged, the question remains as to the importance to be given to such particular facts.

In view of the well-known general situation of affairs, the particular facts subsequently discovered are relatively unimportant unless it is shown that Mr. Allison was probably influenced by his retainers in these matters.

No such proof has been given, nor can any such inference be legitimately drawn. No claim or criticism is made that he was overpaid for his services. Moreover it has been distinctly shown that at no time did Mr. Allison ever act for and against the city in the same proceeding or act as referee in any action or proceeding in which he had ever advised either of the parties as to any matter involved in the reference before him or had acted as attorney or counsel for either of the parties as to any matter so involved. And it further appears that the attorney making the present motion as attorney for the Dawson estate acted on the trial before Mr. Allison in concert with and not in opposition to C. W. Dayton, the attorney for the Twelfth Ward Bank; that they both opposed the

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claims of the city and those of the Patten estate; that within the past few years Mr. Allison has twice acted as counsel, in behalf of the said Twelfth Ward Bank, in matters in which said Dayton was attorney; that at the very time the reference herein was proceeding before Mr. Allison he was, and he still is, counsel for the president of said bank in an action to which such president was a party individually and which involves a large amount; and that nevertheless Mr. Allison decided against the bank in this action. Moreover the bank does not join in the present attack upon Mr. Allison, although it has a very large and substantial interest, while the Dawson estate has but a slight and remote interest. And in conclusion it may be said that after all the real question involved in the controversy between the Dawson estate and the city seems to be one of law which can be fully presented and taken care of upon the appeal from the judgment entered upon the referee's report.

For the foregoing considerations the case at bar is completely covered by the case of Baird v. Mayor.

A motion was made in that case to remove John K. Porter, as referee, upon the ground that the referee had such professional relations with the plaintiff and his assignor, as to render it improper that the case should be tried by him.

It appeared by the affidavits that the referee was counsel for a corporation intimately connected with the plaintiff, and Judge Davis, at Chambers, in denying the motion, said:

"It is not pretended that the employment of Judge Porter as counsel for the Gilbert Elevated Railway Company has been brought about, since the reference to him, for the purpose of affecting his determination of this case, for his retainer was long antecedent to the reference, and neither the plaintiff nor his assignor ever had anything to do with it, nor has it occasioned any personal relations between him and the plaintiff or his assignor, that can reasonably be supposed to have affected to any extent his judicial fairness. I have looked through the affidavits and the proceedings on the reference, and the statements of the counsel on this subject before the referee to see if I could discover the slightest ground for a suspicion that his decision of this case might be influenced by the fact of his being counsel for the Gilbert Elevated Railroad Company; but I can discover no ground whatever for entertaining such belief or fear. The counsel on both sides frankly declare that they neither make nor believe in any such imputation. The case is not brought, therefore, within any of the authorities

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cited where a party to a reference with obvious intent to gain favor with a referee, has employed him as counsel, or placed business in his hands, and the referee has accepted the same with reason to suppose that such was the intent."

This opinion is in manuscript, but upon the affirmance of the order denying the motion to set aside the order of reference by the General Term, an appeal was taken to the Court of Appeals and the court said:

"We think this order should be affirmed. The question whether there were any relations between the referee and the plaintiff, or his assignor, which rendered it improper for the referee to hear and decide the case, and called upon the court to vacate the order of reference was addressed to the discretion of the court below, and its decision is not reviewable here. We may say, however, in passing, that, in our judgment, there is not the slightest ground for the motion in this aspect." Baird v. Mayor, 74 N. Y. 382-385.

The motion to set aside the referee's report and the judgment entered thereon should be denied, with $10 costs, but the moving party may have thirty days after service of a copy of the order to be entered hereon to make and serve a case on appeal.

Ordered accordingly.

MICHAEL J. FRENCH and ELI SMITH, Administrators, etc., of PATRICK J. FRENCH, Deceased, Plaintiffs, *v.* THE SOCIETY OF SELECT GUARDIANS, Defendant.

(Supreme Court, New York Trial Term, March, 1898.)

Benevolent societies — By-laws as a part of the contract — Strict construction.

Where the certificate of the incorporation (Laws of 1875, chap. 267) of a benevolent society refers to its laws and rules and a member upon joining it, agrees in writing to conform to them, its by-laws become a part of the contract; and neither he, nor his estate, can subsequently be relieved from the result of a by-law, depriving him of sick benefits by its provisions that there shall first be deducted from an assessment levied, and which produces less than $1,000, one-third thereof, as the contribution of the member to the reserve fund of the society.

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ACTION on benefit certificate issued by defendant.

W. R. Spooner, for plaintiffs.

Hobbs & Gifford, for defendant.

MCADAM, J. The defendant is a benevolent society incorporated under the Act of 1875 (chap. 267), entitled "An act for the incorporation of societies or clubs for certain lawful purposes." The subject of insurance is not among the purposes enumerated in the act, unless it falls within those designated as "mutual benefit" and "benevolent." The certificate of incorporation of the defendant states that one of the objects of the society is "to provide for rational, social enjoyment, and to establish a relief fund from which its members, complying with its laws, rules and regulations, may receive assistance, so that its members may be mutually benefited," and the by-laws (§ 5) name as one of the objects, "to establish a relief fund from which members of the organization, who have complied with its laws, rules and regulations may receive (§ 6) the benefit of a sum not exceeding $25 per week, when, by reason of disease or accident, he becomes disabled from following his usual occupation; or, an amount of not more than $1,000 when he has held a continuous membership in the society for seven years; provided, however, that the sum drawn from the society by any of its members shall never exceed in sick disability one-half the sum named in the certificate of membership." On June 14, 1887, Patrick J. French became a member of the defendant, and received from it an "investment and certificate," in which he was declared to be entitled to all the rights and privileges belonging to his rank and standing, including a *pro rata* share not exceeding $1,000 from the investment fund of the society, upon certain conditions, the third of which provides: "In case the said member shall continue to pay all assessments, dues and demands which may be legally made against him, or against this certificate, for the full term of seven years from this date, and shall in all particulars maintain himself in good standing in this society, then the said member shall be entitled to a sum not exceeding the principal amount named herein, less the amount which he has received as benefits from the society on account of disability, or otherwise, with accumulated interest from date of each payment to date of expiration of certificate." French retained his membership in the society for seven years, having during that time discharged all his

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obligations to the society. He received in sick benefits during the seven years $325, and brought the action to recover $675, upon the theory that under the certificate he became entitled to $1,000. He died pending the action, and it has been continued by his legal representatives. Upon joining the society French signed an agreement in these words: "I agree, if admitted, to conform to all the laws, rules and usages of the society, and to promptly comply with all lawful requirements." The certificate also refers to the laws, rules and usages of the society; so that these, with the application, evidently became part of the contract. Hellenberg v. Dist. No. 1, Ind. Ord., 94 N. Y. 580; Grossman v. Supreme Lodge, 13 N. Y. St. Repr. 596; Numrich v. Supreme Lodge, 24 id. 287; Demings v. Supreme Lodge, 131 N. Y. 522; May v. N. Y. Safety Reserve Fund Soc., 14 Daly, 389; Farmers' L. & T. Co. v. Aberle, 18 Misc. Rep. 257; s. c., 19 App. Div. 79; Redmond v. Ind. Ben. Ass'n, 78 Hun, 104; Syuchar v. Workingmen's Ass'n, 14 Misc. Rep. 10; Matter of Globe Mut. Ben. Ass'n, 63 Hun, 263; Home Forum Ben. Order v. Jones, 50 Pac. Repr. 165; Hass v. Mutual Rel. Ass'n, 49 id. 1056; Holland v. Taylor, 111 Ind. 121; Protection L. Ins. Co. v. Foote, 79 Ill. 361.

The defense is founded on one of the by-laws, which provides that when the amount of one assessment on all the members, after deduction of one-third of the sum for the reserve fund, is less than $1,000, the sum payable to a member holding a certificate like that issued to French shall in no case exceed the amount realized from such assessment less one-third thereof for said reserve fund. The laws and rules of the society, therefore, expressly fits the "*pro rata*" interest of the holder of each certificate, and in their own terms limit the amount to be received under any certificate to not more than one assessment levied and paid, less the share passing to the reserve fund. In this instance the assessment realized $455.75, out of which one-third was paid into the reserve fund, leaving $303.83; and after charging French with the sick benefits paid to the amount of $325, and the interest thereon, he became and was a debtor to the defendant at the time his certificate matured, so that the defendant owed him nothing thereon. That this result is worked out according to the by-laws is certain. While the plaintiffs must in consequence fail in the action, the result merits criticism. The avowed scheme of the defendant to pay a member $1,000 in seven years, in consideration of less than one-third of that amount received by it in installments, depended for its suc-

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cess upon so many doubtful contingencies that it would have been a miracle if it had not failed just as it did. It was nothing more or less than a game of chance or gamble, which has no place in any system of life insurance, for in that, if in nothing else, the utmost good faith must be observed. The officers of the defendant evidently did the best they could, but the scheme would not work; the logic of mathematics would not permit of its success. Fraternal societies should not engage in methods which are delusive, for they are fraught with danger to an unsuspecting and worthy class of people seeking to guard against improvidence. Their dealings should be open and fair, that the members may not be deceived. They should never intimate anything in a certificate that cannot be made good to the fullest expectation of the beneficiary. This, however, does not affect the legal rights and obligations of the parties as they arise here, for construing, as we must, the policy with the application and by-laws, the court has no alternative but to find for the defendant.

Ordered accordingly.

THE SATHER BANKING COMPANY, Plaintiff, *v.* LOUIS HARTWIG, et al., Defendants.

(Supreme Court, New York Trial Term, March, 1898.)

1. **Replevin — Title by delivery of the bill of lading upon a discount of a draft against consigned goods.**

   The delivery of a bill of lading of goods to a bank by a consignor, as collateral, upon its discount of his draft upon the consignee, vests in the bank a title to the goods which can be divested only by the payment of the draft.

2. **Same — Seizure under attachments against consignors — Measure of damages.**

   Where such a draft has been neither accepted nor paid, third persons who intercept and levy upon the goods under attachments against the consignors, and who subsequently procure the sale of the goods by the sheriff and also indemnify him in the premises, are liable to the bank in an action of replevin and may properly be charged therein with the amount which the goods brought at the sheriff's sale, which was well attended by dealers.

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ACTION of replevin to recover possession of certain almonds.

Van Duzer & Taylor, for plaintiff.

U. W. Tompkins, for defendants.

MCADAM, J. The action is in replevin to recover the possession of 329 sacks of almonds shipped from California to New York, December 14, 1895, by Porter Brothers & Co., a San Francisco firm, on car No. 3806 of the Sunset Route, Southern Pacific Co. On the day of the shipment, Porter Brothers & Co. drew their draft on Thos. Roberts & Co., of Philadelphia, Pa., the consignees, for $1,458.33, payable to the order of the plaintiff, a California banking institution, and the plaintiff discounted the draft, taking as collateral security the bill of lading for the goods. The draft was neither accepted nor paid; whereupon the plaintiff made claim for the goods, but failed to obtain them because Hartwig and Roberts, two of the defendants, had intercepted them on their arrival at New York, and caused them to be seized by the sheriff on attachments which they procured against Porter Brothers & Co., the consignors. The said defendants, by virtue of the attachments and an order of the court permitting the sale of the goods as perishable property, caused the almonds to be sold by the sheriff; the two other defendants becoming indemnitors of the sheriff, and thereby making themselves liable for the wrong. Herring v. Hoppock, 15 N. Y. 409; Dyett v. Hyman, 129 id. 351; Cow. Tr., §§ 566, 765; Van Dewater v. Gear, 21 App. Div. 201. If, previous to the seizure, title to the property had passed to the plaintiff, the levy and sale under the attachments were wrongful. The delivery of the bill of lading to the plaintiff, for the purpose of securing the payment of the draft drawn by the consignors upon the consignees, and which the plaintiff discounted, was sufficient to pass the title to the almonds to the plaintiff, subject to be divested only by the payment of the draft. Cayuga N. Bank v. Daniels, 47 N. Y. 631; Bank of Rochester v. Jones, 4 id. 497; Gibson v. Stevens, 5 How. (U. S.) 384; First N. Bank v. N. Y. Cent. & H. R. R. R. Co., 85 Hun, 160; 4 Am. & Eng. Ency. of L. (2d ed.) 522, 545. The defendants' contention that they are not liable without proof of a personal direction to levy and sell is untenable. Ford v. Williams, 13 N. Y. 577. The giving of the bond of indemnity and the other acts done were for the benefit of the attaching creditors, who accepted the proceeds of sale and approved of what had been done. Cow. Tr., §§ 566, 765; 2 Hilliard on Torts

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(2d ed.), 312, 313. The sheriff's sale was well attended, and there was competition among dealers. The property brought thereat $1,560.43, a sum exceeding the amount of the draft, which was for $1,458.33, and this latter amount as against the defendants will be accepted as the fair market value of the goods. Gill v. McNamee, 42 N. Y. 45 Dixon v. Buck, 42 Barb. 70; Campbell v. Woodworth, 20 N. Y. 499; Parmenter v. Fitzpatrick, 135 id. 190; Crounse v. Fitch, 1 Abb. Ct. App. Dec. 475. The plaintiff is entitled to judgment for the possession of the property claimed, assessing its value at $1,458.33, with interest. See Barnett v. Selling, 70 N. Y. 492, 494.

Judgment for plaintiff.

HELEN D. WARD, Plaintiff, *v.* THE ST. VINCENT'S HOSPITAL, Defendant.

(Supreme Court, New York Trial Term, March, 1898.)

Charitable hospital — A pay patient burned by a hot-water bag — Duty of the hospital in selecting nurses.

The proof, made in an action, tended to show that the defendant was a hospital conducted for public charitable purposes and that, although accepting pay patients, it used all such revenues wholly for the support of the institution, for which purpose they were insufficient. The plaintiff, a pay patient, was severely burned upon her leg, because, after an operation performed upon her and while she was still under the influence of anaesthetics, an under-nurse neglected to remove from the leg an uncovered hot-water bag. This nurse had been a probationary appointee and had still about sixteen months to serve in the hospital before she would be entitled to a diploma. The superintendent of nurses was entirely competent. The defendant had a verdict.

Held, that notwithstanding the fact that the plaintiff was a pay patient, the action was not one upon contract, but sounded in tort.

That, the defendant was only liable for negligence in its original selection of servants, was not liable for the subsequent act of a servant, unless knowledge of her unfitness had been brought home to the corporation and that this rule was alike applicable to all patients whether they paid or not.

Quaere, whether a charitable hospital is liable, in the matter of selecting nurses, beyond the selection of the head nurse.

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MOTION to set aside a verdict and for a new trial.

A. I. Elkus and E. C. James, for motion.

Charles E. Miller and Austen G. Fox, opposed.

COHEN, J. On the 20th day of February, 1894, the plaintiff entered the institution maintained by the defendant as a public charitable institution (Laws of 1848, chap. 319), on Eleventh and Twelfth streets, in the city of New York. On the afternoon of the following day she was put under the influence of ether for the performance of a "slight" operation by Dr. Lusk, who was her own private physician, as well as a visiting surgeon on defendant's staff. The operation was successfully performed, and plaintiff, while still under the influence of the anesthetic, was carried to her room and there placed in a bed from which a hot, uncovered water bag had not been removed by the nurse in attendance. Thus her right leg was severely burned. The wound continued open, and she suffered great pain from the injury until the 21st day of December, 1896, when Dr. McBirney performed a surgical operation upon the leg and the wound healed. The usefulness of the limb still remains considerably impaired.

Before plaintiff became an inmate of the hospital, Mrs. Howland, a sister of the plaintiff, went there, entering by the Twelfth street side, a building described by her as the "private pay patients'" department. She there made arrangements and paid to one of the sisters of charity, who were in charge of the hospital, $25 for the occupancy by the plaintiff of a private room and for medicines for the term of one week. At the same time, Mrs. Howland gave expression to the fears of the plaintiff and her family about the dangers of anesthetics, and requested that the plaintiff be supplied with a skillful, experienced trained nurse, and was told by one of the Sisters that the very best skilled nurse would be furnished to, and the very best care taken of, the plaintiff. The charge for the nurse was then agreed upon at $3 a day, which was subsequently paid. This arrangement was reported to the plaintiff, who pursuant to it, entered the hospital, where the events hereinbefore recited occurred.

It further appears from the evidence that, in addition to the room, medicine and nurse, which were paid for by the plaintiff, she received the other accommodations which the hospital afforded, including the attendance of Dr. Hughes, the house surgeon, and of

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Miss Sanborn, the superintendent of nurses at St. Vincent's Hospital. No question is made of the competency or skill of the superintendent, but some evidence is introduced to show that the nurse, by whose gross carelessness the hot-water bag was left in the plaintiff's bed, had entered the institution in June, 1893; was placed on a month's probation, and in July began a course of instruction which would terminate in two years, at which time she would be entitled to a diploma. Miss Sanborn testified that she had instructed the nurse in the use of hot-water bags and had previously employed her as attendant nurse in serious surgical cases, where she had given entire satisfaction.

At the end of the whole case the court directed a verdict in favor of the defendant.

The learned counsel for the plaintiff insist that such direction was error, on the ground that the defendant was guilty of the breach of an express contract, and is, therefore, liable for that breach as well as for a breach of duty at common law; and maintains further that, even if there had been no contract, the defendant is liable on the ground that the defendant, although a public charitable institution, cannot claim the immunity given to such institutions in this case, as the plaintiff was a pay patient. Furthermore, that the public policy granting this immunity is unsound, and the basis upon which it rests insecure, and lastly, that in the selection of the nurse there was evidence of negligence which should have been submitted to the jury.

The counsel for plaintiff with some ingenuity has, in the complaint, in the evidence offered and in the brief submitted laid almost equal stress upon the breach of an express contract by the defendant as upon the breach of duty imposed by law; but no ingenuity can alter the cause of action here. It cannot be doubted that there would be a cause of action on the facts here presented independent of any contractual relation, if the plaintiff established negligence sufficient to hold the defendant. Even assuming that the defendant had power to make the contract, it was not necessary to rely upon and prove it. This furnishes the test. Turner v. Stallibrass, (1898), 1 Q. B. 56; Schick v. Fleischhauer, 26 App. Div. 210. Of course, evidence of the contract was properly admissible here as is proof of the payment of fare in cases of a passenger sustaining personal injuries by reason of the negligence of the carrier, but such evidence does not change the cause of action. This, then, is an action in tort.

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What is the duty owed by the defendant to the plaintiff, is the next question to be considered. The defendant, the hospital, is a public charitable institution. It was doing no business for profit, and the money it received from patients like the plaintiff went to the support of the institution, and was far from sufficient to meet its expenses without contributions of charitably disposed individuals. Its affairs were managed by Sisters of Charity, who freely gave constant and faithful service; there were no stockholders to whom dividends, even if earned, could have been paid.

As I read the cases, such a defendant is only liable for negligence in the original selection of its servants; having fulfilled that duty, it is not liable for the subsequent act of such servant, however careless or negligent, unless previous knowledge of unfitness has been brought home to the corporation. This limitation is founded upon public policy, upon which the very doctrine of *respondeat superior* itself may be said to be founded. Wood on Master and Servant, § 277. Much may be said against the soundness of this principle, and whether it would not be wiser to hold even public charitable institutions to a higher degree of care. But in this country it has been settled that for the promotion of works of humanity, and for the greater good of the greater number, that this is a sound public policy. McDonald v. General Hospital, 120 Mass. 432; Boyd v. Insurance Patrol of Philadelphia, 113 Penn. St. 269; Joel v. Woman's Hospital, 89 Hun, 73.

The opinions in the case of Glavin v. Rhode Island Hospital, 12 R. I. 411, contain many expressions antagonistic to this limitation of liability, and to the wisdom of the policy which underlies it, but in its decision the court holds the corporation liable only for care in the selection of its servants.

Some confusion is occasioned by reason of the citation in the McDonald case, *supra*, of Holliday v. St. Leonard, 11 C. B. (N. S.) 192, which exempted a *quasi*-public corporation from liability for the negligent act of its servants, and which case was subsequently overruled in Coe v. Wise, L. R., 1 Q. B. 711; Mersey Docks Trustees v. Gibbs, L. R., 1 H. L. 93. But no English case has been cited, nor have I been able to find any, which departs from the American rule affecting a corporation engaged only in public charity, and doing no business for profit, as is concededly true of the defendant in this case.

It is further contended that since the plaintiff was a pay patient the rule is not the same as heretofore expressed, but in the Glavin case, *supra*, the plaintiff was a pay patient, and an examination

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of the record in the Joel case, *supra*, will also show that the plaintiff was not a free or charity patient. Indeed, the Joel case is almost precisely like the one under consideration, and, being a decision of the General Term of the Second Department of this court, is conclusive upon me. Moreover, it has been expressly held in another class of cases that a charitable institution does not waive its exemptions because it charges some patients who are able to pay. People ex rel. N. Y. Hospital v. Purdy, 58 Hun, 386; 126 N. Y. 679; Matter of Will of Vassar, 127 id. 1; in which case, at page 15, the McDonald case is cited with approval.

The final contention of the plaintiff is that there was some evidence of negligence in the selection of the nurse assigned to the plaintiff. The answer to this is that it may be doubted, under the cases above cited, whether the defendant's liability extended beyond the selection of a competent head of the school of nurses connected with the defendant. It will be conceded, or if not, the evidence is absolutely conclusive that Miss. Sanborn, the superintendent of the training school for nurses had many years' experience as a subordinate nurse, some years as the head of nurses both at New York Hospital and the Skin & Cancer Hospital, and for about two years had charge of the nurses of the defendant. Her manner on the stand and her testimony convinced me that she was a woman of unusual skill and experience in her profession, and of remarkable executive ability. She had fully instructed the nurse whose act is here complained of in the use of water bags and the necessity for covering them. The assistant had been employed in the abdominal ward where operations of a much graver character than that to which the plaintiff was subjected were common without complaint or mishap. It seems from the nature of the act here complained of that the variest tyro in nursing would have known better than to have been so grossly negligent as was the nurse in charge of the plaintiff. It cannot have been from want of training or knowledge, because any person of average age and average intelligence, without any special training, would know the dangerous character of such an act. It was a single act of thoughtlessness or forgetfulness. Therefore, where is the evidence of causative negligence of the defendant corporation with regard to the selection of the particular nurse, even assuming its duty extended beyond Miss Sanborn, as the head of the nursing department? It follows from these views that the direction in favor of the defendant was right, and the motion to set aside the verdict and for a new trial

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must be denied, however deeply one's sympathies may be aroused by the misfortune which has befallen the plaintiff, who doubtless has a good cause of action against the nurse who was the wrongdoer, but not against St. Vincent's Hospital.

Motion denied.

WILLIAM SILVERMAN et al., Plaintiffs, *v.* WILLIAM L. DORAN et al., Defendants.

(Supreme Court, Niagara Equity Term, March, 1898.)

Action on the case for conspiracy — Fraud in the issue of a foreign patent — While the foreign decision stands, it cannot be reviewed collaterally — Measure of damages.

The complaint in an action on the case for a conspiracy, among other things, alleged that the defendants had conspired to appropriate an invention which the plaintiffs had made, that, upon an application made by both parties to procure a patent in the Dominion of Canada, an arbitration was had under its laws and that the defendants then succeeded by perjury and by subornation of perjury and secured the patent; that they had since manufactured under it to the great damage of the plaintiffs and that the latter had no other or adequate remedy for the wrong. The complaint failed to set out either the patent statutes of Canada or their substance. The defendants demurred.

Held, that the demurrer must be sustained.

That the gist of such an action was the damages already sustained and that, to that end, the plaintiffs must show that they were entitled to have had the patent issued to them in Canada.

That, in the absence of proof of the Canadian statutes, the court could not assume that those officials had no power to revoke the patent for a conspiracy, involving fraud and perjury, and issue it to the plaintiffs; that such a question involved a rehearing of the matters decided by the Canadian arbitrators, that their decision was in the nature of a judgment and that, while it stood, it could not be reviewed collaterally through the medium of the present action.

DEMURRER to a complaint on the ground of a failure to state facts sufficient to constitute a cause of action.

Ely, Dudley & Cohn, for plaintiffs.

Cary & Wallace, for defendants.

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LAUGHLIN, J. The plaintiffs are copartners in the business of manufacturing and selling suspenders, braces and garters, at wholesale, in the city of Williamsport, Pa., and one of them, for the benefit of the firm, has, as is alleged, obtained a patent from the United States Government on an original invention known as a "grip back," or clasp designed to be used for securing together the rear ends of the main suspender straps and also to form a solid and substantial holding for the loop carried by the buttonhole straps, which invention was of great value and well advertised and known throughout the United States. Defendants are brothers, doing business as copartners at Niagara Falls, New York, and Niagara Falls, in the Province of Ontario, and their business consists in manufacturing and selling suspenders.

The substance of the remaining allegations of the complaint is that an agent of the plaintiffs exhibited a sample of such suspender clasp to the defendants, or one of them, who thereby and in December, 1889, became acquainted with the invention; that the defendants fraudulently, wickedly and wrongfully conceived and put into execution a plan to appropriate the invention, and that thereafter one of them fraudulently and falsely made application to the patent office of the Dominion Government for a patent thereon, without the knowledge of the plaintiffs and with knowledge on their part that the plaintiffs were about to apply for a patent thereon in the Dominion of Canada; that the application, so made by the defendants to the Dominion authorities for a patent, contained false statements to the effect that one of the defendants was the first and original inventor of said improvement; that the application was filed, and that the plaintiff Harris, in behalf of all the plaintiffs, thereafter made application to the patent office of the Dominion of Canada for a patent on said invention, and, a conflict having arisen between the two applications thus made, it was referred to arbitrators to decide between the conflicting applications; that one arbitrator was appointed to act for each of the applicants and one was appointed under a patent act of the Dominion of Canada; that the three arbitrators met and heard proofs of the respective claimants, in accordance with the law of the Dominion of Canada; that two of the defendants were sworn as witnesses, and that they wickedly, knowingly and wrongfully testified falsely concerning the material matters, and that the defendants suborned others as witnesses to testify falsely in regard to the material matters on said hearing, to the effect that one of the defendants had

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invented and conceived the idea contained in such grip back or clasp and that he had caused the model or models thereof to be made in or about the months of January and February, 1889, and that dies were procured therefor by the defendants in May, 1889, from one Molloy in West Haven, Connecticut, and that sales thereof were made by the defendants and their salesmen in July, 1889, and that such grip backs had been made and used by the defendants prior to the invention thereof by the plaintiff Harris; all of which testimony so given and procured to be given by the defendants was false and known to be false both at the time it was given and procured to be given; that the plaintiffs believed that such testimony was false, but were not aware of the conspiracy by which the same was obtained, and have only learned thereof within the year preceding the commencement of this action; that the award of the arbitrators in consequence of such false testimony, was adverse to the plaintiffs; that the patent was thereafter issued upon said invention to one of the defendants for the benefit of all; that the defendants have since manufactured and sold such invention under such letters patent, and are using said letters patent as and for their own; that the defendants published and circulated the fact that they were the owners of such letters patent, and, by reason thereof, have been enabled to make large sales of suspenders which they otherwise would not have made, and have thereby prevented large sales by the plaintiffs; that such patent is of great value; that large profits have been and are being realized by the defendants therefrom; that large profits and royalties would have been realized by the plaintiffs from such invention but for the wrongful and fraudulent act of the defendants; that, in committing the acts complained of, they wrongfully, wickedly and maliciously conspired together to appropriate the said invention and the profits and advantages thereof, and to procure for their benefit a patent thereof by perjury and subornation thereof, to the plaintiffs' damages in the sum of $100,000; and that the plaintiffs have no other or adequate remedy for such wrong.

The patent statutes of the Dominion of Canada are not set forth in the complaint, nor is the substance thereof alleged. The patent officials may, under such law, have some discretion with reference to the issuing of such patents and the court cannot assume that the plaintiffs were entitled, as a matter of law and right, to such patent. The allegation that the plaintiffs have no other adequate remedy is a conclusion. The court is asked to assume that the Canadian officials, having once issued a patent, have no authority to revoke the

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same, even upon proof that it was procured through a conspiracy, involving fraud and perjury. This is an action on the case for conspiracy, and it seems to be conceded, in all the decisions, that the gist of such an action is not the conspiracy, but the damages which the plaintiffs have sustained. In other words, no action lies for a new conspiracy, but the plaintiffs must show that they have lost some property or right and sustained damages. The plaintiffs have sustained no damages unless they were entitled, as a matter of law and right, to the patent at the hands of the Canadian Government, nor unless they can present a case showing that the patent would have been issued to them but for the fraud, perjury and conspiracy of the defendants. That necessarily involves a review and rehearing of the questions passed upon by the arbitrators, who were duly appointed under the Canadian law as alleged in the complaint, and heard the proofs of the respective parties and made their decision in favor of the defendants. While, as before observed, the complaint does not enlighten us as to the Canadian patent laws, we may very properly assume from the allegations that the arbitrators were appointed pursuant to such laws, heard all testimony offered by the respective parties and made a decision, that their decision was in the nature of a judgment, and was a judicial determination of the question which could not be reviewed collaterally by the courts, but only by direct application made to the proper authorities or by some appeal, if the laws provided for such. There is no difference in principle between this case as thus presented and an action for a conspiracy against persons who have recovered a judgment against a plaintiff upon false and perjured testimony. Upon principle and considerations of public policy, it is manifest that such an action ought not to lie while the judgment stands. Such is the rule of law established by the decisions. Ency. of Plead. & Prac., vol. 4, p. 738; Stevens v. Rowe, 59 N. H. 578; Dunlap v. Glidden, 31 Me. 435; Ross v. Wood, 70 N. Y. 11, 12.

An action does not lie, in favor of the defeated party to a litigation, against a witness who gave material testimony upon trial, for perjury or false swearing or fraud in so doing, nor does an action lie against the successful party to a litigation in favor of the defeated party on account of false testimony, or for having suborned witnesses to testify falsely thereon. Smith v. Lewis, 3 Johns. 160; Revis. v. Smith, 18 C. B. (86 C. L.) 126; Bostwick v. Lewis, 2 Day, 447; Verplanck v. Van Buren, 76 N. Y. 259.

The plaintiffs' counsel relies entirely upon the case of Verplanck v. Van Buren, *supra*, but on a most careful consideration of that

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decision, I am of the opinion that it is clearly distinguishable from the case at bar on the facts. The plaintiff in that case had recovered a judgment of the defendants upon an accounting. After the recovery of such judgment, the plaintiff discovered that, through a fraudulent combination and conspiracy on the part of the defendants, their accounting was false and untrue in one particular, and they had perpetrated a fraud upon the plaintiff by making a false contract and false entries in their books, by which it appeared that the amount due and owing to the plaintiff on account of certain sales was considerably less than the sales were in fact made for, so that they had failed to account in the former action to the plaintiff for a certain specific sum of money concerning which no testimony had been given, and, while this matter might have been litigated had the facts been known, the proof to establish the same in the second action was proof entirely different from that presented in the former action. The damages which, as before observed, are the gist of an action for conspiracy, were in that case definite and easily determined, and in no manner depended upon the existence or nonexistence of the former judgment.

It follows that the demurrer must be sustained, with costs, and judgment to that effect may be entered and dismissing the complaint upon the merits, with costs.

Ordered accordingly.

THE TOWN OF WHEATFIELD, Plaintiff, *v.* FRANK SHASLEY et al., Defendants.

(Supreme Court, Niagara Equity Term, March, 1898.)

Highway Law — Encroachment — Lawfully planted shade trees.

Shade trees planted, under the authority of chapter 93 of the Laws of 1863, by the owner of the fee in a highway which he has dedicated to the public and which do not encroach upon that part of the highway, which has been in public use for thirty years, do not constitute an encroachment or obstruction, within the meaning of the Highway Law (Laws of 1890, chap. 568, § 105), and their removal cannot be procured in an action brought under the statute by the town highway commissioners.

The scope of this provision of the statute considered.

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ACTION by highway commissioners to compel the removal of obstructions or encroachments upon a highway.

Harrington & Premus, for plaintiff.

Hopkins & Brim, for defendants.

LAUGHLIN, J. This action is brought under section 105 of the Highway Law (chap. 568, Laws of 1890), which provides that "The commissioners of highways shall serve upon the owner or occupant of land adjoining that part of a highway within their town, in which any obstruction or encroachment may exist, a notice specifying the extent and location of such obstruction or encroachment and directing such owner or occupant to remove the same within a specified time, not more than sixty days after the service of the notice. If such owner or occupant shall refuse to remove such obstruction or encroachment within such time, he shall forfeit to the town the sum of $25, and the commissioners may remove such obstruction or encroachment at the expense of the town, which may be recovered by action of such owner or occupant; or such commissioners may bring an action in any court of competent jurisdiction to compel such owner or occupant to remove such obstruction or encroachment. Actions by commissioners of highways as in this act provided, shall be in the name of the town."

The highway nearest Niagara river running through the town of Wheatfield, in Niagara county, between the cities of North Tonawanda and Niagara Falls, is known as the River Road. The defendant Witmer owns a farm which extends on both sides of the highway, and he also owns the fee of that part of the highway which thus runs through his farm. The original road became such by public user and ran through this farm several rods nearer the river bank than the highway as now used. The defendant Shasley occupies the farm as Witmer's tenant. The first record of the original road shows that it was described, recorded and declared a public highway, three rods in width, by the highway commissioners on the 14th of November, 1854, under the statute authorizing such action with respect to highways that have been used as such for upward of twenty years. On the 26th day of September, 1867, the highway commissioners filed with the town clerk an order, purporting to alter the course of this highway at the points in question, and said order was recorded by the town clerk on February 12, 1868. This

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order is somewhat indefinite. Experienced surveyors, called by the defendants, claim to be able to locate the center line of the highway from it, and experienced surveyors called by the plaintiff claim that this cannot be done with a sufficient degree of accuracy to be of any assistance in determining the controverted questions involved in this action. It, however, satisfactorily appears, that at about this period of time the property owners along the highway, including the defendant Witmer's grantors, met and mutually agreed upon a change of the route of the highway over their lands. Thereupon the defendant Witmer's grantors opened up the new road to a width of substantially four rods, and, upon either side of the graded roadbed at regular intervals and in line across the entire width of the farm, set a row of shade trees, mostly maple, leaving practically three rods for public travel between them. These trees have grown to be large, ornamental and useful shade trees; the trunks varying in diameter from ten to eighteen inches. The row of trees on the southerly or river side, consisting of twenty-eight, constitutes the alleged obstruction or encroachment which the highway commissioner has, in the form required by the statute hereinbefore quoted, notified the defendants to remove, and for their failure to comply with his order he has instituted this action in the name of the town to obtain a decree compelling them to do so. Fences were erected along the sides of the road nearly four rods apart, about the time the trees were planted, but the fences have been changed and moved so that it cannot be satisfactorily determined whether they were originally erected the same distance from the row of trees on the south as on the north side. The evidence, with reference to the line of travel, the grading of the carriageway and the work done upon the highway by the town authorities, and the probabilities of the case, all indicate that the center of the highway was considered as being midway between these rows of shade trees, both by the public authorities and by the owner of the fee. The Revised Statutes made it lawful for the abutting owners to plant shade trees in the highway, and, at the time that these shade trees were planted and this road was thus dedicated to the public, chapter 93 of the Laws of 1863 was in force, encouraging the abutting owners to plant shade trees in the highways. This statute was amended by chapter 570 of the Laws of 1874, and both were repealed by chapter 568 of the Laws of 1890, but the rights of persons who had planted shade trees before such repeal are preserved by section 181 of the repealing act, as

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construed by the court in Edson v. Howell, 86 Hun, 424. The statute provided that where a road was three rods wide, shade trees might be planted in the highway so that the centers of the trees should be not more than six feet from the exterior boundaries of the road nearest thereto, and, where the highway was more than three rods in width, then the centers of the trees should be not more than eleven feet from such boundaries. The center line of this highway, as located by the surveyors called by the defendant, acting on the record of 1867, which has been referred to, closely approximates the line midway between these two rows of trees. It will be seen, therefore, that whether this is a three-rod road of which there is a record, or a four-rod highway by dedication and user, the trees were lawfully planted.

On the 22d day of December, 1876, the following action was taken by the board of supervisors concerning this highway, to-wit:

"*Resolved*, That the highway commissioners of the town of Wheatfield be now authorized and hereby directed to cause a survey of the road (through said town), known as the Military (or, as it is sometimes called, the Niagara River) Road, to be made, the center of said road to conform as nearly as practicable to the center of said road as now located, and to be reduced to and made of the uniform width of four rods, and shall cause such survey to be recorded in the town clerk's office, in the town of Wheatfield, and a copy thereof filed in the office of the county clerk of Niagara county, and when such survey is so recorded, it shall be the legal record of said road."

The surveyor, assisted by the highway commissioners, surveyed this highway as directed by said resolution and such survey was recorded in the town clerk's office on the 5th day of April, 1877. The evidence conclusively shows that no change was made in the roadbed, line of travel, shade trees or fences, as a result of this survey, and no steps were ever taken by the town authorities to compel a change in the location of the road to conform to such survey, if it was in fact intended thereby to change the location of the highway in any respect.

The plaintiff bases this action upon the foregoing resolution of the board of supervisors, and upon the survey last referred to, and claims that according to this survey the center of the highway is within about one rod of the southerly row of trees and is about two rods from the northerly row of trees. It is conceded by all the surveyors called in the case that there is an error in the record of

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this survey with respect to the course over the farm in question and that the center line of the highway cannot be determined from the record of this survey alone. Following the course as given by the record of this survey would carry the highway entirely south of the south row of trees so that on the easterly side of the defendant's farm no part of the highway would be between these rows of trees, or where the highway has been located and used by the public for upwards of thirty years, for there has been no public travel, excepting between these rows of trees, for more than thirty years. The surveyors called by the plaintiff, however, conceding the error in the record, say that by other references, not official, they located a monument within the lines of the present highway between the rows of trees and within about one rod of the southerly row of trees which answers the description of the monuments set at the time of making that survey, and they believe it to be the monument set by the surveyor at the end of the course on which he ran the center line of the highway across the premises in question. The difficulty with this conclusion is that the length of that course from the starting point to such monument does not correspond with the record length of the course, and the only witness who saw the monument set, the highway commissioner who assisted the surveyor in doing the work, says that the course was run midway between the rows of trees and that the monument was set about midway between the rows of shade trees which had been planted and growing there for about ten years at that time. Taking all of the facts into consideration, and bearing in mind the purpose of the public authorities as shown by the resolution to lay out the highway as a four-rod road as nearly as practicable as it then existed, I cannot find that the location of the highway was changed by the survey of 1877, and consequently it is unnecessary to pass upon the validity of the action of the board of supervisors, and of the highway commissioners thereunder, the only authority for which was chapter 482 of the Laws of 1875. The action of the board of supervisors and highway commissioners would in any event be ineffectual for taking any land theretofore dedicated to or acquired by the public for highway purposes, as the landowner had no notice of the proceeding and no compensation was awarded for the land. The public authorities could do no more than ascertain and describe the highway as it actually existed at the time, without taking eminent domain proceedings to acquire any additional lands that might be needed. People ex rel. Downey v. Dains, 38 Hun,

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48 Talmage v. Huntting, 29 N. Y. 447; People v. Judges, etc., 24 Wend. 491; Ivory v. Town of Deerpark, 116 N. Y. 482.

I am of the opinion that the trees in question were lawfully planted and that the highway was dedicated by the owner of the fee, subject to his ownership of the trees and his rights to maintain them as highway shade trees. Having been lawfully set and maintained, they are neither encroachments nor obstructions, within the intent and meaning of the statute. The court is only authorized, under this statute, to compel the removal of an encroachment and obstruction where the owner or occupant could be fined for not complying with the order of the highway commissioner and where the highway commissioner would have the right, if he saw fit, to remove the encroachment or obstruction, without first bringing suit. The authority was conferred upon the court to settle controverted questions of facts seriously controverted and the highway commissioner becomes liable for trespass in acting upon his own belief as to the facts. It was also undoubtedly intended to authorize the court to pass upon questions of law as to the legal existence of the highway and as to whether the obstruction encroachment complained of is, in fact, under the law an obstruction or encroachment; but in my opinion it was not designed to confer power upon the court to compel the removal of shade trees which have been lawfully planted in the highways. If public convenience requires their removal, the public authorities must first, by an appropriate proceeding, condemn the same and see that compensation is awarded to the owner. This decision states concisely the grounds upon which the issues herein have been decided, and, without formal separate findings, judgment may be entered dismissing the complaint upon the merits, with costs.

Complaint dismissed, with costs.

CHARLES O. PERRY, Appellant, *v.* NEWMAN ERB, Respondent.

(Supreme Court, Appellate Term, March, 1898.)

Statute of frauds — Original promises — Consideration.

A complaint which states that, after a dispute had arisen between Theresa Erb and the plaintiff, concerning a contract between them, they made a settlement and that a part of this was a parol promise,

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upon the part of the defendant, to pay a claim which a subcontractor had made against the plaintiff, affords in itself no ground for a recovery upon this latter claim as constituting an original undertaking upon the part of the defendant to pay the debt of a third person and, in the absence of any evidence showing that any benefit or advantage moved to the defendant, or that he was under any duty to pay the claim, a dismissal of the complaint upon the merits is proper.

Perry v. Erb, 22 Misc. Rep. affirmed.

APPEAL from judgment of the General Term of the City Court of the city of New York.

Austin E. Pressinger, for appellant.

Howard S. Gans, for respondent.

BEEKMAN, P. J. If the judgment appealed from rested only on the grounds assigned by the court below, we should perhaps hesitate to affirm it here, but the validity of the contract in suit is attacked on the ground that it was an agreement to pay the debt of another, and that it was void under the Statute of Frauds, because not in writing subscribed by the respondent. This objection, if well taken, is a fundamental one, and renders any recovery in the action impossible. The point was raised by the defendant in his answer, among other defenses, during the course of the trial, and was one of the grounds on which he moved to dismiss the complaint. It is, therefore, properly presented here for our consideration.

It is not pretended that the agreement in question fulfilled the requirements of the statute. There was no memorandum of the alleged promise subscribed by the respondent, so that the appellant is forced into the position of claiming that the promise is not within the statute because it was an original undertaking founded upon a new and independent consideration, and was not, therefore, an engagement to pay the debt of another within the meaning of the statute as it has been construed by the courts. There is a wealth of learning on the subject, the tendency of which in this state certainly has been towards upholding the statute and avoiding refinements of construction tending to narrow its operation. Mallory v. Gillett, 21 N. Y. 412; Brown v. Weber, 38 id. 187; Smart v. Smart, 97 id. 559; Ackley v. Parmenter, 98 id. 425; White v. Rintoul, 108 id. 222.

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It is not claimed in the case at bar, nor could it well be, that there was any benefit received by the respondent by reason of the alleged promise, but it is urged that there was harm to the promisee, the appellant, and that this is sufficient to make the promise an original undertaking, and, therefore, not one affected by the statute. While it is true that in the case of Leonard v. Vredenburgh, 8 Johns. 29, a definition was given which assumed as the test of an original promise that it was founded on a new or further consideration of benefit or harm moving between the promisor and the promisee, the definition thus given has not been followed, but in all subsequent decisions has been referred to as inaccurate, and in the case of White v. Rintoul, *supra*, was pronounced by the court to be "dangerously broad and capable of a grave misapprehension, making it almost possible to say that a promise good at common law between the new parties was good also in spite of the statute." The well-established rule now is that it is essential, in order to make the promise an original undertaking, that the new consideration should move to the promisor and be beneficial to him. In the case of Ackley v. Parmenter, *supra*, Judge Rapallo, in giving the opinion of the court, says (p. 433): "In such a case it is not sufficient to show that there was a consideration for the promise. There must be a consideration in every case, even if the promise is in writing. But a consideration is not of itself sufficient to supply the place of a writing where one is necessary. To take the case out of the statute there must be a consideration moving to the promisor, either from the creditor or the debtor. It must be beneficial to the promisor. That is the feature which imparts to the promise the character of an original undertaking. Mallory v. Gillett, 21 N. Y. 412. Forbearance or indulgence to the debtor, or the surrender to him by the creditor of a security for the debt, even at the request of the promisor, will not support a verbal promise by a third party to pay the debt."

This case is referred to with approval in the case of White v. Rintoul, *supra*, in which the whole subject is most ably discussed and reviewed by Judge Finch, giving the opinion of the entire court.

The facts of the case at bar, in so far as they bear on the question under discussion, are tersely stated by the plaintiff in his complaint. He alleges a contract between the appellant and one Theresa Erb for making certain alterations and additions to certain premises in the city of New York; that the appellant entered upon

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the performance of the contract and completed it, but that, differences having arisen between the said Theresa Erb and the appellant as to the value of certain extra work that was done upon the property and the balance which was due to the appellant on the contract, a settlement of such differences was had and agreed upon between her and him, whereby the latter agreed to accept in full settlement of all claims against her a certain sum of money. It is stated that it was a part of the consideration of this settlement that the respondent should pay to the appellant the said sum and also a certain claim made against the appellant by a subcontractor. It is with respect to this claim that this action was brought. There is no evidence in the case whatsoever showing that there was any benefit or advantage moving to the respondent by virtue of this promise, or that before the promise any duty whatsoever rested upon him to pay the claim. None of the elements which, under the decisions, must exist in order to make the promise in question an original undertaking is discoverable, and we are accordingly constrained to hold that the promise was one coming directly within the statute, and, therefore, void, because of a failure to comply with the statute.

Counsel for the appellant refers to the case of Merserau Co. v. Washburn, 6 App. Div. 404. We have examined this case, but find nothing in the law there laid down which conflicts with the cases which we have cited, or which assumes to lay down any different principles from those which are enunciated in such cases. The court there held, upon the facts of that case, that there was a distinct pecuniary advantage to the promisor on which his undertaking was founded, which made the promise an original one. The case was, therefore, in harmony with the previous declarations of the court on the subject.

In view of the conclusion to which we have come, it is unnecessary to consider the other exceptions in the case, as none of them bears upon the matter which we have discussed, and a new trial could not result otherwise than in a dismissal of the complaint on the ground of the invalidity of the contract itself.

Judgment affirmed, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment affirmed, with costs.

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DORA M. THOMAS, Respondent, *v.* CHARLES F. RISLEY, Appellant.

(Supreme Court, Appellate Term, March, 1898.)

Guaranty of collection — Effect of a condition, "after all means have been exhausted against" the lessee.

An instrument by the terms of which a guarantor promises to pay all damages which may arise from a breach of the covenants of a lease, without notice of default, "after all means have been exhausted against" the lessee, is a guaranty of collection; and the condition of the guaranty is satisfied where the lessor recovers judgment upon a liability to him of the lessee, and issues an execution thereon which is returned unsatisfied; it being unnecessary that the lessor should proceed to supplementary proceedings.

APPEAL from judgment of the City Court of the City of New York.

John A. Grow, for appellant.

Theodore H. Friend, for respondent.

BEEKMAN, P. J. The respondent leased certain premises in the city of New York to one Robert G. Bredin, for the term of one year, reserving therefor a rental which the lessee agreed to pay in equal monthly instalments. The lease also contained a covenant by which the lessee bound himself to pay the Croton water rent assessed upon the premises during the term demised. It was a part of the consideration of the letting that the appellant should guarantee the payment of the rent and the performance by Bredin of the other covenants contained in the lease which were to be performed by him. The guarantee, which was in writing, was accordingly executed and delivered simultaneously with the delivery of the lease. By its terms the appellant covenanted and agreed with the respondent that if default should at any time be made by the said Robert G. Bredin in the payment of the rent and the performance of the covenants contained in the lease on his part, to be paid and performed, he, the appellant, would well and truly pay such rent, and also all damages that might arise in consequence of the nonperformance of said covenants or either of them, without requiring notice of any such default from the respondent "after all means have been exhausted against said Bredin."

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Bredin having made default in the payment of certain instalments of rent, and also having failed to pay the water rent as agreed, the respondent brought suit against him for the amount so due, recovered judgment therefor, and issued execution thereon, which was returned by the sheriff wholly unsatisfied. Thereupon the respondent brought this action against the appellant upon the guaranty, setting up in her complaint the facts above stated, all of which were established by proof upon the trial. At the close of respondent's case, the appellant moved to dismiss the complaint on several grounds, one of which, and the only one that merits consideration here, being that the respondent had failed to show "that she had exhausted all the remedies or means against said Bredin with whom the lease was made." The motion was denied and an exception taken; whereupon, the appellant having rested, the court directed a verdict in favor of the respondent for the full amount claimed.

The sole question, therefore, which is presented by the record for our consideration is whether, as a matter of law, the proceedings taken by the respondent against Bredin satisfied the condition of the guaranty expressed in the words "after all means have been exhausted against said Bredin." While it is conceded that the means thus referred to import legal remedies, it is still claimed that the respondent was not entitled to rest upon the return of the execution unsatisfied, but was bound to take proceedings supplementary to execution against the judgment debtor; and that, so long as there existed any remedy provided by law for the collection of a debt which had been untried by the respondent, the condition of the guaranty was unsatisfied and no action thereon would lie. We do not consider this claim tenable. While it was entirely competent for the parties to the contract to have assented to such a condition, and to have made the limitation upon the guarantor's liability as broad as the claim here made, they did not explicitly do so, but by the use of a general and somewhat inartificially framed stipulation, have left its meaning to be determined by the court as a matter of construction.

The construction must be a reasonable one, and in harmony with that which the court has placed upon similar conditions. We are of the opinion that the guaranty in question was one of collection, and that the liability of the appellant did not attach until the respondent had exhausted her remedies for the collection of the claim against the principal debtor. When this has taken place, it

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is no longer open to discussion. Schmitz v. Langhaar, 88 N. Y. 503. In the case cited, the guarantor agreed to pay "in case the money cannot be collected." At page 506, the court says: "In such a case the law of this state construes the obligation as an undertaking, that the demand is collectible by due course of law, and the guarantor bound to pay the sum specified in the original contract, 'provided the principal is prosecuted to judgment and execution with due diligence, and the same cannot be collected of him.' Craig v. Parkis, 40 N. Y. 181. We have come to regard these proceedings and the return of the proper officer that the writ cannot be enforced, as the best evidence that the method of procedure prescribed by law for the collection of debts has been followed, and of the debtor's inability to pay." Again, at page 508, the court says: "Nothing more is exacted; neither an execution against the person, although it might be had (Thomas v. Woods, 4 Cow. 173), nor proceedings to outlawry, in case of an absconding debtor (Ten Eyck v. Tibbits, 1 Caines, 426), nor if the debt is collectible in a justice's court only, a transcript filed (Backus v. Shipherd, 11 Wend. 629), nor in any case a creditor's bill, or proceedings taken analogous thereto; neither is the creditor required to pursue the sheriff, although that officer may have become liable for the debt by reason of failure to collect the execution, or other remissness of duty. Leonard v. Giddings, 9 Johns. 355. Thus has been defined the means which the creditors shall use, and the extent to which those means shall be employed. The execution is the end and finisher of the law (Backus v. Shipherd, *supra*); beyond it no effort need be made, or means tried, or extraordinary proceedings of any kind resorted to."

In the case at bar the respondent has fully met the requirements of the law as thus laid down. She was "to exhaust all means against" the principal debtor; that is, she was bound to proceed against him first for the collection of the debt, and to employ all the remedies which in such cases the law declares to be appropriate for the purpose. When the execution against the principal debtor was returned unsatisfied, she had complied with all which the law prescribed as necessary to establish the ultimate fact on which the guarantor's liability was in effect predicated, namely, the inability of the principal debtor to pay the debt, and her right of action against the appellant became complete.

All that the appellant urges here, in support of a more enlarged construction of the guaranty under consideration by reason of the

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form in which it is expressed, would apply with equal force to a case where the condition of the guaranty is expressed in the words "in case the money cannot be collected from the principal debtor," — a stipulation which would seem to be quite as broad as the one under examination. In one sense the inability to collect cannot be ascertained until every legal expedient to enforce payment which the armory of the law supplies has been resorted to and found futile. But, as we have seen, the law, in such case, defines a limit of effort which falls short of such an interpretation and expresses the bounds of a reasonable compliance with the demands of such a condition, which is all that may be exacted: This limit excludes proceedings supplementary to execution. The creditor could not reasonably be expected, and is not, therefore, required to embark upon a sea of profitless and expensive litigation for the purpose of demonstrating his inability to collect his claim.

We find no reason, in the peculiar phraseology of the guaranty in this case, for the application of any different rule. As we have already intimated, the parties could have extended the terms of the condition so as to include supplementary proceedings, but, upon what we think to be a reasonable construction of the very general language which they have employed, we are of the opinion that they have failed to do so. It follows that the judgment below must be affirmed, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment affirmed, with costs.

MAX FLICKER, Appellant, *v.* LOUIS GRANER et al., Respondents.

(Supreme Court, Appellate Term, March, 1898.)

1. Services — Construction of contract.

The plaintiff a cloak operator and the defendants, who were manufacturers, entered into a contract for one year, under which the defendants agreed to pay the plaintiff and his finisher $20 per week, the defendants to retain any weekly excess until the contract was fully performed. Although during the seventeen weeks the plaintiff earned $181, in excess of $20 per week, he earned in the year only $895 and had been paid $1,040.

Held, that he could not recover, additionally, $181.

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2. **Contracts — When their construction is for the court.**

The construction of a contract is for the court, where its terms and language have been ascertained and there are no technical phrases nor latent ambiguities.

3. **Practice — Right of a party to withdraw his request for the direction of a verdict.**

Semble, that, although both parties request a verdict in their favor, and the court thereupon directs a verdict for the defendant, the plaintiff may, if there is any question of fact, withdraw his request and ask that the case be submitted to the jury.

APPEAL from a judgment of the General Term of the City Court, affirming a judgment of the Trial Term in favor of defendants.

A. H. Berrick, for appellant.

Wahle & Stone, for respondents.

GILDERSLEEVE, J. The defendants are cloak manufacturers, and in the month of September, 1894, they entered into a written agreement or contract with the plaintiff, by which they agreed to employ plaintiff in their business as a cloak operator on piece work, at the same prices as paid to all the operators working on their premises for complete finished garments; the plaintiff, however, was to employ and to pay a competent finisher out of his own earnings; and such employment was to continue for the term of one year, from September 29, 1894, to September 29, 1895. The defendants agreed to pay to the plaintiff, on account of the work done and completed by him and his finisher, weekly, every Saturday, the sum of $20; and any excess of his earnings above the amount of $20, paid to him weekly, was to be retained by the defendants until the agreement expired, and the plaintiff had faithfully carried out the provisions of the agreement. In consideration of the weekly wages, guaranteed by the defendants to the plaintiff, the plaintiff agreed to work for the term of one year for the defendants, on their premises, under the conditions aforesaid, in the usual and customary way, and industriously.

The undisputed evidence shows that for seventeen weeks the plaintiff earned a total sum of $181.70 above and in excess of his $20 weekly salary; but that, at the end of the year, he had only earned in all, for the whole year, the sum of $895.80; whereas, he had been paid, as weekly guaranteed wages, the sum of $1,040,

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which was $144.20 in excess of his total earnings for the year. Plaintiff claims that, under the contract, he is entitled to this sum of $181.70, in addition to the $1,040 salary already paid him.

Both sides, at the trial, asked for the direction of a verdict, and the court accordingly, ordered a verdict for the defendants; whereupon plaintiff withdrew his request for the direction of a verdict, and asked to have the case submitted to the jury on the questions of fact.

It is true that in a case where both parties request the court to direct a verdict, the court is thereby clothed with the functions of the jury, with respect to any question of fact in the case, and, in the absence of a request to go to the jury by the party against whom the verdict is directed, the decision stands in the place of a verdict; yet, in the case at bar, as we have seen, the plaintiff, upon a denial of his motion and the granting of the motion of the defendants, made the request to have the case submitted to the jury. He was not precluded from making this motion by his previous request to have a verdict directed in his favor; and, if there had been any evidence competent to submit to the jury, upon any disputed question of fact, the denial of his motion would have been error. See Shultes v. Sickles, 147 N. Y. 705; Switzer v. Norton, 3 App. Div. 173. But, in the case at bar, there was no question of fact to be submitted to the jury. The only question was one of law as to the construction of the contract. When the terms and language of a contract are ascertained, in the absence of technical phrases, or of terms, the meaning of which is obscure, or of latent ambiguities, rendering the subject-matter of the contract uncertain and doubtful, the office of interpreting its meaning belongs to the court. See Brady v. Cassidy, 104 N. Y. 148. We are of opinion that the learned trial court committed no error in refusing to submit the case to the jury. We also concur in his construction of the contract. The contract was for a year; there is no claim made that plaintiff did not get his share of the work, or that there was any discrimination against him in that respect, or that he and his finisher did not get the same prices, for the piece work done by them, as that paid to all the operators working on defendants' premises, as provided for in the contract. At the expiration of the contract, it is found that he has been paid $144.20 more than he has earned. The contract clearly indicates that plaintiff was to be guaranteed $20 a week, and that if, at the end of the term, *i. e.*, in one year, he had earned more than his guaranteed

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salary, he was to receive that sum in addition to such salary. The contract specially provides that the defendants "shall retain any excess of his earnings until the end of the contract," *i. e.*, at the end of the year. As we have seen, at the end of the year plaintiff was found not to have any excess of earnings, but, on the contrary, to be $144.20 behind.

We think the court made no error in directing a verdict for the defendants, and it, therefore, follows that the judgment appealed from must be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

GEORGE F. VIETOR et al., Respondents, *v.* GEORGE T. NICHOL et al., Appellants.

(Supreme Court, Appellate Term, March, 1898.)

1. **Sales — Evidence of a right to return defective goods.**

Proof that some of the goods sold were returned to and were accepted by vendors renders it proper, in an action for the price, to submit to the jury the question whether there was not, as the vendees alleged, an agreement that they were to have the privilege of examining and from time to time returning, defective goods.

2. **Appeal — Effect of excepting to a verdict.**

Where the defendants do no act tending to waive their right to go to the jury, their exception to a verdict, directed in favor of plaintiffs, raises the point whether there were any questions for the jury.

Vietor v. Nichols, 20 Misc. Rep. 718, reversed.

APPEAL by the defendants from a judgment of the General Term of the City Court of New York, affirming a judgment entered in plaintiffs' favor upon a verdict directed by the court at Trial Term. Action to recover balance of $1,473.87, claimed by plaintiffs to be due for merchandise sold and delivered to the defendants.

Campbell & Hance (Herbert H. Walker, of counsel), for appellants.

Blumenstiel & Hirsch (A. Blumenstiel, of counsel), for respondents.

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GIEGERICH, J. We think the case should have been submitted to the jury on the question, whether there was any agreement between the parties by which the appellants were to have the privilege of examining and returning defective goods, from time to time, as the articles sold were taken from the plaintiffs' warehouse. The actual return of goods and the acceptance of the same by the respondents from time to time tended to sustain the claim made by the appellants that there was such an agreement, and was a corroborative circumstance which the jury were entitled to take into consideration.

The respondents seek to uphold the judgment on the ground that the appellants did not request to go to the jury upon any question of fact, but as the latter did not move for a dismissal of the complaint, or do any other act from which a waiver of their right to go to the jury could be implied, their exception to the direction in respondents' favor is sufficient upon this appeal to raise the point whether there were any questions of fact requiring determination by the jury. Vail v. Reynolds, 118 N. Y. 297, 301, and citations.

As there must be a new trial, we consider it proper to say that greater care should be shown in putting in the proofs. Among other things, it is impossible to determine from the record what discounts the defendants were entitled to and on what basis they were estimated.

The judgment should, therefore, be reversed and a new trial ordered, with costs to the appellants to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed, and new trial ordered, with costs to appellants to abide event.

MORRIS GOLDBERG et al., Respondents, *v.* HENRY MITTLER et al., Appellants.

(Supreme Court, Appellate Term, March, 1898.)

Election of landlord, excusing tenants who have held over.

Although tenants hold over the term two days, the subsequent action of the landlords in letting the premises, about fifteen days later, to a new tenant for a period of nearly a year, is an election which precludes them from subsequently recovering rent of the original tenants for an ensuing year.

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APPEAL from judgment of the District Court, in the City of New York, for the fourth judicial district.

Max D. Steuer and A. S. Levy, for appellants.

Charles L. Cohn, for respondents.

BEEKMAN, P. J. It is undisputed that the appellants had a written lease of the premises in question for a term of one year, expiring on the 1st day of May, 1897, at a rental payable monthly in advance. It is also conceded that they held over and used and occupied the premises until the 3d day of May, 1897. They had previously notified the landlords of their intention not to remain after the expiration of their lease, and a notice "To Let" had accordingly been placed upon the premises by the respondents about a month before the expiration of the term. It further appears beyond dispute that on the 18th day of May, 1897, a written lease of the premises in question was made and entered into between the respondents and one Ernest Lesser, which was, however, to commence on the 1st day of June, and to continue until the 1st day of May, 1898. The new tenant, however, was permitted by the respondents to take possession of the premises in the month of May. The original lease to the appellants did not contain any provision permitting the landlords to let the premises on their account in any contingency. This action was brought for the purpose of recovering rent for the month of May, 1897, upon the ground that the appellants, having continued in possession after the expiration of their lease, became tenants of the premises on the same terms for the ensuing year.

The law is well settled that when a tenant under a demise for a year or more holds over after the end of his term without any new agreement with the landlord, he may be treated as a tenant from year to year, and in all other respects as holding upon the terms of the original lease. The landlord has an election to treat him either as a trespasser or as a tenant, and it is for the former to determine how he will regard him. The tenant, however, has no such election. Conway v. Starkweather, 1 Den. 113. The doctrine laid down in this case has been approved in the case of Schuyler v. Smith, 51 N. Y. 309. At page 315, in the case cited, the court says: "The safe and just rule I believe to be the one established by authority, that a tenant holds over the term at his peril; and the owner of the premises may treat him as a trespasser or as a tenant for another year upon the terms of the prior lease, so far

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as applicable." The case of Conway v. Starkweather, *supra*, is referred to with approval, the court stating, page 316, that it seems to have been well considered, and has stood unquestioned for more than twenty-five years.

In the case of Rosenberg v. Lustgarten, 41 N. Y. State Repr. 623, it was held by the General Term of the Court of Common Pleas, following the decisions above referred to, that "Where a tenant holds over, the landlord may treat him either as a trespasser or a tenant. Witt v. Mayor, 6 Robt. 451; Schuyler v. Smith, 51 N. Y. 315. But such holding over puts the landlord to his election; he must either accept the tenant as a tenant for a new term or treat him as a trespasser; he cannot do both." See also Adams v. City of Cohoes, 127 N. Y. 175; Haynes v. Aldrich, 133 id. 287; Herter v. Mullen, 9 App. Div. 593.

We think that the act of the landlords in this case in making a new lease of the premises to another tenant, some fifteen days after the appellants had removed, for the period of nearly a year, is conclusive evidence of an election on their part not to treat the appellants as tenants for another year. Their conduct in thus dealing with the premises was utterly inconsistent with the theory upon which this action was brought. For if they are entitled to recover the month's rent for the month of May, the appellants would certainly be entitled to expect and demand possession of the property for the year ending May 1, 1898, and the respondents would be compelled to claim that they never intended to consider the appellants as their tenants for any such period. It has been well said that no landlord can have two tenants for the same premises at the same time under conflicting claims. We, therefore, see no escape from the conclusion that the respondents did not elect to treat the appellants as their tenants after the 1st day of May, 1897, and the latter must, therefore, be considered as trespassers for the time that they actually occupied the property, and consequently liable only for the damages flowing from that relation.

It follows from what has been said that the judgment below was erroneous, and should, therefore, be reversed.

Judgment reversed, and a new trial ordered, with costs to the appellants to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed, and new trial ordered, with costs to appellants to abide event.

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GEORGE BATCHELOR, Respondent, *v.* JOSEPH C. HATIE, Appellant.

(Supreme Court, Appellate Term, March, 1898.)

Evidence — Failure to produce an original document — Secondary evidence.

Where a person seeking to recover a loss, evidenced only by an insurance "binder," asks to introduce an alleged copy of the "binder," he must show that he has in good faith made every reasonable effort to discover and produce the original; and those who presumptively would have possession of the paper, as well as those who at any time have seen it, should be particularly examined on the subject.

APPEAL from judgment of the District Court in the City of New York, for the first judicial district.

Bainbridge Colby, for appellant.

Otto Kempner and Otto H. Droege, for respondent.

BEEKMAN, P. J. It was of paramount importance for the respondent to show that there was a binding contract for the insurance, to recover which this action was brought, before the fire which caused the loss took place. It is conceded that no formal policy of insurance had then been issued, but the claim was made that what is known in insurance parlance as a "binder," had been made in writing and delivered to the insured by the duly authorized agent of the appellant the day before the fire took place. The appellant denies that any such binder was issued, and also contends that if it had been, the person who assumed to do it was not an agent of the company vested with either actual or apparent authority to bind it in that way.

Upon the trial the justice admitted in evidence, over the objection of the appellant, a paper which was conceded to be merely a copy of the alleged binder, made by a person who issued it, from memory some time after the loss had taken place, and after the liability of the appellant had been brought in question. The substantial accuracy of this so-called copy was vouched for under oath on the trial by the alleged agent of the company who had prepared the original. We are, however, of the opinion that a sufficient foundation for secondary evidence of this character had not been laid. Presumably the original paper, if it existed at all, was in the possession of the respondent or of his assignors, the in-

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sured. They should have been examined with respect to the existence of the original paper, with a view of establishing its loss, and it should have been satisfactorily made to appear that every reasonable effort had been exhausted by them for the discovery of the original without success before parol evidence of its contents should have been admitted. We find among the exhibits in the case, a letter, written by the alleged agent of the company, who is said to have given the binder in question, dated August 25, 1896, some three months after the fire, in which he asks the plaintiff's assignors, the insured, to send him a copy of such binder which had been given to them. They were not, however, examined with respect to their possession of it. Whether they ever saw it, or who actually received it, if they knew, from the alleged agent of the appellant, or where it was placed after it was received, does not appear. Those who presumptively would have had possession of such paper, as well as those who had at any time actually seen it, should have been particularly examined on this subject. In short, it should have been made to appear that every reasonable effort had been made for its discovery and production. Kearney v. Mayor, 92 N. Y. 617.

In the case above cited, the court says, page 621: "The general rule is that the party alleging the loss of a material paper, where such proof is necessary for the purpose of giving secondary evidence of its contents, must show that he has in good faith exhausted, to a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him." It is also stated in the same case that "it has repeatedly been held that the person last known to have been in possession of the paper must be examined as a witness, to prove its loss, and that even if he is out of the state, his deposition must be produced if practicable, or some good excuse given for not doing so."

We are of the opinion that the respondent has entirely failed to satisfy the requirements of the rule. It was, therefore, error to admit secondary evidence of the contents of the paper in question, for which the judgment must be reversed. While we think from the proofs before us that the authority of the alleged agent of the appellant to issue the binder is open to doubt, we consider it advisable not to pass upon the question now, but to leave it an open one, so far as the determination of this appeal is concerned, in view of the fact that there must be a new trial upon which there may be additional evidence on the subject.

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Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

SAMUEL PENNIMAN, Appellant, *v.* AMELIA J. LAGRANGE, Respondent.

(Supreme Court, Appellate Term, March, 1898.)

District courts of New York — Loss of jurisdiction by a failure to render judgment in time.

Where the record shows that a trial justice, of a District Court in the city of New York, failed to render judgment within eight days after the trial and submission to him of the case, the judgment must be reversed, as he has lost jurisdiction. (Laws of 1882, chap. 410, § 1384.)

APPEAL from a judgment of the District Court of the City of New York for the eighth judicial district, rendered by the justice without a jury, in favor of the defendant.

William L. Mathot, for appellant.

William J. Walsh, for respondent.

BEEKMAN, P. J. The record before us shows that the trial justice lost jurisdiction of the action by his failure to render judgment within eight days after the trial, and the submission of the case to him for decision. Section 1384 of the Consolidation Act of the City of New York; Bloomer v. Merrill, 1 Daly, 485; Orvis v. Curtiss, 8 Misc. Rep. 681; 28 N. Y. Supp. 728. In the case last cited, which was decided by the General Term of the Court of Common Pleas, it was held that, where this omission appears upon the face of the return, the judgment should be reversed. Such must, therefore, be our disposition of this appeal. The conclusion to which we have come precludes us from reviewing the judgment on the merits. Judgment reversed, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed, with costs.

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THE TITUS SHEARD COMPANY, Appellant, *v.* EDWARD F. MORRISSEY, Respondent.

(Supreme Court, Appellate Term, March, 1898.)

Municipal Court of New York city — A nonresident may proceed by long summons — Costs.

A domestic corporation, having its place of business in a county other than New York and therefore a nonresident of that county, is not bound to proceed in the Municipal Court of that city by a short summons, accompanied by security for costs (Laws of 1882, chap. 410, § 1299), but may proceed by long summons, in which case it cannot be required to give security.

APPEAL from a judgment of the Municipal Court of the City of New York, borough of Manhattan, eighth district, dismissing the complaint.

Charles R. La Rue, for appellant.

Robert McMahan, for respondent.

BEEKMAN, P. J. The plaintiff is a domestic corporation having its place of business at Little Falls, in this state, and is, therefore, a nonresident of the county of New York, within the meaning of the statute which regulated the issuing of the summons in the court below. Upon the trial, the justice dismissed the complaint solely upon the ground that the plaintiff, being a nonresident of the county, should have given security for costs. This ruling proceeded upon the assumption that the plaintiff was bound to take out a short summons, in which event such security was necessary. Section 1299, N. Y. City Consol. Act. The summons which was issued, however, was what is known as a "long summons," and the contention of the appellant is that it was optional with him to commence his action by either a long or a short summons, and having elected to sue out the former, he was not obliged to give security for costs.

There can be no doubt of the correctness of this claim, which has been authoritatively settled by the General Term of the Court of Common Pleas in the case of Glass v. Place, 5 Daly, 110. It is true that the contrary had been previously held by the same court

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in Haullenbeck v. Gillies, 7 Abb. Pr. 421, and again in Dean v. Cannon, 1 Daly, 34; but both of these cases were decided under chapter 344, Laws of 1857, governing the matter, before its amendment by chapter 484 of the Laws of 1862, and have been completely nullified by the amendatory act referred to. In Glass v. Place, *supra*, the court says, page 111: "These provisions of the act, as thus amended, expressly afford nonresident plaintiffs the right to elect that a short summons should be issued in their favor, on giving security for costs, and only require such security in case of such election."

There has been no subsequent change in the statute referred to, which is now embodied, in precisely the same language, in sections 1298 and 1299 of the Consolidation Act (chap. 410, Laws of 1882), which are still in force (The Greater New York Charter, § 1369); nor has the construction given to it in the case of Glass v. Place, which was obviously correct, ever been questioned in any case since reported. As the judgment below was clearly erroneous, it should be reversed, and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

ARCHIE L. WISNER, Respondent, *v.* OSTEYEE BROS., Appellant.

(Supreme Court, Appellate Term, March, 1898.)

Coupons of negotiable bonds of a corporation — Proof that the holder took them in bad faith.

Where an action is brought upon a coupon of a negotiable bond issued by a corporation, it is entitled to show that the plaintiff received it in bad faith, knowing that it was stolen and that he had not parted with value for it; as the special immunities of the holders of such instruments extend only to those persons who have acquired them before maturity in good faith and for value.

APPEAL from a judgment of the District Court of the City of New York for the sixth judicial district, rendered in favor of the plaintiff.

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Benjamin Patterson, for appellant.

Samuel C. Herriman, for respondent.

BEEKMAN, P. J. The respondent brought this action to recover the amount of a coupon which had been attached to a bond issued by the appellant, which is a corporation. The proof, as far as it went, tended to show that he had come into possession of the instrument before maturity, and he was entitled to the presumption which obtains under such circumstances that he had acquired title thereto in good faith and for value — a presumption, however, which may be overcome by evidence tending to show the contrary. The trial justice, however, refused to allow the appellant to show that the respondent had received the coupon in bad faith, with knowledge of the fact that it had been stolen, and without having parted with any value therefor. In ruling upon the question, the justice stated as follows: "The question is not allowed, upon the ground that there is no evidence before the court that the instrument which is offered here is anything but a negotiable paper, and under the decisions of the highest courts, in both state and the United States, the coupons are negotiable and payable to the person having possession thereof."

It is true that such an instrument is correctly classified as negotiable (Evertson v. National Bank of Newport, 66 N. Y. 14), but the special immunities which are enjoyed by the holders of such paper extend only to those who have acquired it before maturity, in good faith and for a valuable consideration. The appellant was, therefore, entitled to show that the respondent was not such a holder, and to adduce evidence tending to impeach his title to the coupon in question. As the ruling excepted to was clearly erroneous, the judgment must be reversed.

The objection taken by the appellant to the admission in evidence of the coupon was not broad enough to raise the question of the sufficiency of its proof. In order to take advantage of this omission, the objection should have been specifically made on that ground.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

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JOHN H. CONROY, Respondent, *v.* FRANK S. ALLEN, Appellant.

(Supreme Court, Appellate Term, March, 1898.)

Appeal — Affirmance on a conflict of evidence.

The decision of a trial justice upon conflicting evidence must usually stand, as the Appellate Court is seldom in a position satisfactorily to review a decision where the determination rests upon a question of the credibility of the witnesses.

APPEAL from a judgment of the District Court of the City of New York for the second judicial district, in favor of the plaintiff.

William L. Stone, Jr., for appellant.

I. Newton Williams, for respondent.

BEEKMAN, P. J. The only question involved in this appeal is one of fact, and the rule is well established that this court will not disturb the conclusion of the trial justice upon such a question, unless it is manifest that it was against the weight of evidence. After a careful examination of the proofs, we are unable to find that such was the case here. The determination of the facts required the trial justice to pass upon the veracity of the witnesses. He had them before him and observed their demeanor on the witness stand and the manner in which they gave their testimony. These are matters which may be legitimately considered where such a question is to be determined, but, from the nature of the case, they are not susceptible of reproduction in the minutes of the trial. The appellate court is, therefore, seldom in a position to satisfactorily review a decision upon the facts where the determination of the case rests upon a question of credibility. We, therefore, feel constrained to affirm the judgment. Judgment affirmed, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment affirmed, with costs.

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GEORGE NIMMO, Respondent, *v.* MAY A. HARWAY, Appellant.

(Supreme Court, Appellate Term, March, 1898.)

1. **Lease — When the fire clause alone measures the liability of the parties — Inapplicability of Laws of 1860, chapter 345.**

In an action brought to recover a deposit, made by a third person to secure the performance of the conditions of a lease, it appeared that the fire clause of the lease provided "The tenant shall, in case of fire, give immediate notice thereof to the landlord, who shall thereupon cause the damage to be repaired forthwith; but if the premises be so damaged that the landlord shall decide to rebuild, the term shall cease, and the accrued rent be paid up to the time of the fire."

Held, that the covenant measured the liability of the parties to the lease, and that chapter 345 of the Laws of 1860 did not apply.

2. **Same — Abandonment.**

It further appeared that the fire, which was not the fault of the tenant, rendered the premises untenantable and that, when nine days later the landlord had made no attempt to repair, the tenant abandoned.

Held, that he was justified in abandoning and that the plaintiff was entitled to the return of his deposit.

APPEAL from a judgment of the Ninth Judicial District Court.

The action was brought by respondent to recover the sum of $250, which was deposited by respondent with appellant as security for the faithful performance of the terms of a lease of premises No. 2191 Eighth avenue, in the city of New York.

Geo. F. Alexander, for respondent.

G. O. & L. S. Hulse, for appellant.

GILDERSLEEVE, J. The plaintiff claims to recover on the ground that the lease was canceled by reason of the fact that the premises were so injured by fire, on September 20, 1896, as to become untenantable and unfitted to carry on the business for which they were rented, and that the defendant failed to cause the damage thereto to be forthwith repaired. This question is presented: Was the emergency, contemplated by the statute of 1860, chapter 345,

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which is an injury by fire making the premises untenantable, covered and provided for by the terms of the lease, and thereby taken out of the scope and operation of the statute? The act in question provides as follows, viz.: "The lessee of any building, which shall be destroyed, or be so injured by the elements, or any other cause, as to be untenantable and unfit for occupancy, shall not be liable or bound to pay rent to the lessor or owner thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant." The fire clause in the lease in question is as follows: "The tenant shall, in case of fire, give immediate notice thereof to the landlord, who shall thereupon cause the damage to be repaired forthwith; but if the premises be so damaged that the landlord shall decide to rebuild, the term shall cease, and the accrued rent be paid up to the time of the fire."

It was the conclusion of the trial justice that the covenant under consideration did not avoid the operation of the statute, and did not create a case where the parties have "otherwise expressly provided by written agreement or covenant."

In Butler v. Kidder, 87 N. Y. 99, the Court of Appeals hold that it is not essential, in order to exclude the lessee from the benefit of the statute, that there should be a covenant, in express terms, obligating him to pay rent, although the building becomes untenantable; but it is sufficient if the intention to take away such benefit is clearly shown on the face of the lease, as where it appears that the parties, having in mind the contingency mentioned in the statute, inserted provisions or covenants inconsistent with the right of surrender.

We think it must be said that the parties to this lease provided, by express covenant, for the contingency of fire, and that this, therefore, furnishes the measure of the tenant's liability, and that the statute has no application. See Tocci v. Powell, 75 N. Y. St. Repr. 905; Butler v. Kidder, *supra*. It is necessary, therefore, to revert to the covenant under consideration and to the incidents that happened, as established by the testimony, in order to determine the rights of the parties.

The fact is fully established that the premises were rendered untenantable by reason of the damage occasioned by the fire, and it further appears that the fire was not the result of any negligence or want of care on the part of the tenant. The covenant in the lease imposed upon the landlord the duty of causing the damage to be repaired forthwith. "Forthwith" means within a reasonable

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time, or without unnecessary delay. After the landlord received notice of the fire, it was his duty to proceed with proper diligence to do whatever was necessary to remedy the injury unless the premises were so damaged that he decided to rebuild, in which case he should have notified the tenant. If the tenant waited a reasonable time for him to do the work, and it was not done, the tenant might remove from the premises if he had been and was deprived of the beneficial use and enjoyment of them. O'Gorman v. Harby, 75 N. Y. St. Repr. 911. Any other construction would compel the tenant to resume possession at an unknown and undeterminable period, measured only by the pleasure of the landlord, which was evidently not the intention of the contracting parties. Bacon v. Albany Perforated W. P. Co., 22 Misc. Rep. 592. As the premises had been rendered untenantable by the fire, it was certainly a reasonable requirement, especially in view of the express language of the covenant, that they should be made tenantable without unreasonable delay. Some diligence on the part of the landlord was contemplated.

It appears from the testimony that the fire occurred on the morning of the 20th of September, and that the same was brought to the knowledge of the landlord almost immediately; but that no repairs whatever had been done up to the 29th of September, when the tenant abandoned the premises. The witness Diebold, a baker, who was the actual tenant and occupant of the premises, testifies: "Q. How soon after the fire did you see Mr. Harway (the agent and representative of the landlord)? A. On Sunday the fire was, and on Monday I saw Mr. Harway; I had a conversation with him in regard to putting the place in order; not the first time, but the second time he came around; Wednesday or Thursday; I asked him if he had got through with his insurance; he said no; I asked him if he was going to have the place fixed up again, so that I could start up again; he said, "I don't know," and turned around and walked away, and I had no talk with him after that. Q. And he didn't come to see you any more? A. No, sir. Q. This Monday that you speak of, where was he or you? A. In front of the house, and the second time too in front of the house. Q. Was the place in such a condition that you could not carry on your business? A. Yes, sir; I couldn't carry on business. Q. How long after the fire did you remain there waiting for Mrs. Harway to put the place in proper shape for you to carry on business? A. From September 20th to September 29th; then

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I moved out; I couldn't do any business there; that is the reason I moved out." Harway, the agent of the landlord, testified that he first heard of the fire on the afternoon of the 20th of September, the day of the fire. With regard to his conversation with the tenant, he testifies, "I said I would fix it up as soon as I got the insurance settled."

It must be said that the tenant waited a reasonable time for the landlord to commence the work of repair, in accordance with the provisions of the lease; that the landlord took no steps to repair the untenantable premises and was in default in not performing the condition precedent with the diligence and promptness required; that the tenant was deprived of the beneficial use and enjoyment of the demised premises, and was justified in moving out. It appears from the record that the landlord never demanded any rent after the fire occurred. Had the landlord brought an action for the rent, we think the tenant could have defended as upon an eviction. See Myers v. Burns, 35 N. Y. 269; Sparks v. Bassett, 49 N. Y. Supr. Ct. 270; 2 Taylor on Land. & Ten. (8th ed.), p. 381; Tallman v. Murphy, 120 N. Y. 346; O'Gorman v. Harby, 75 N. Y. St. Repr. 911.

While it is true that, after the breach of the covenant to repair, on the part of the landlord, the tenant had the right to perform the work himself, and recover the cost in an action for that purpose, or upon a counterclaim in an action for the rent, he, nevertheless, was not bound to follow that remedy. He could choose between that remedy and the right to move out, as either of those courses were open to him under the law. See Tallman v. Murphy, *supra;* O'Gorman v. Harby, *supra;* Myers v. Burns, *supra;* Sparks v. Bassett, *supra.* He elected the latter. Under the circumstances, we are of opinion that the tenant was justified in regarding the lease as canceled, and his liability thereunder as terminated; and that the plaintiff is entitled to recover back from the defendant the sum of $250, which was deposited by him as security.

For the reasons above stated, the judgment appealed from should be affirmed, with costs to the respondent.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs, to respondent.

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JOHN F. BANNON, Appellant, *v.* SIGMUND LEVY et al., Respondents.

(Supreme Court, Appellate Term, March, 1898.)

Appeal — Affirmance on a conflict of evidence.

Where the issue in a case is, whether a father, as agent for his sons, ordered certain goods, or whether he merely ordered samples from which selections could subsequently be made, and the evidence is conflicting and depends mainly upon the testimony of one witness upon each side, the decision of the trial justice should be affirmed.

APPEAL from a judgment of the Twelfth District Court, dismissing the complaint.

Fromme Brothers, for appellant.

Hayman & Rosenthal, for respondents.

GILDERSLEEVE, J. This action was brought to recover for goods sold and delivered; the answer is a general denial. On a former trial, the complaint was dismissed, and an appeal was taken to this court, where the judgment was reversed and a new trial ordered. 20 Misc. Rep. 581. Another trial was had, where the complaint was again dismissed, and the case again comes before this court on appeal.

The only witnesses called for plaintiff were his assignor, Gribbie, and the employee of said assignor, Demorest; while the defendants produced only one witness, Simon Levy, the father of the defendants. At the beginning of the trial, he is referred to, in the stenographer's minutes, as Sigmund Levy, which is evidently a clerical error. The evidence shows that this Simon, on behalf of defendants, entered into negotiations with plaintiff's assignor, Gribbie, in January or February, 1895; but whether it was for the sale of goods, or merely of samples, is a disputed question in the case. It appears from the evidence that the goods were made and delivered by plaintiff's assignor to defendants, on or about May 25, 1895, but were forthwith returned by defendants. It also appears that sometime previous to this transaction, Simon had ordered goods, on behalf of defendants, from Gribbie, and had paid for them with checks signed by defendants, which appellant claims as a fact tending to justify Gribbie in regarding Simon as

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the agent of defendants in the transactions which gave rise to this action. Simon swears that he had no authority to order goods, but could only order samples from which defendants selected the goods. It does not appear, however, that Gribbie had any notice of this limitation in Simon's agency. Gribbie swears that Simon, in the latter part of February, 1895, gave him an order for three numbers of inks, one gross at $60, one at $31.25, and one at $28.12, which were to be delivered after the 1st of May, 1895. These goods were, in fact, as we have said, delivered to defendants on or about May 25, 1895. Gribbie also swears that he only made goods to order. Simon himself was called to the stand by plaintiff, and examined as follows: "Q. Did you testify on the former trial that you bought goods for them (defendants) and sold goods for them, and gave orders? Did you testify 'I did almost anything — sold goods and ordered goods?' A. Ordered goods; yes, sir. Q. Was that true? A. I ordered goods for them. Q. That was true? A. After I had samples. Q. You ordered goods for them? A. I ordered goods after we had samples; I bought samples of different manufacturers in this line of goods; and after my boys sold some goods on those samples, then we ordered just the quantities that they had sold. Q. You never ordered any goods otherwise? A. No. sir." When called as a witness for his sons, the defendants, Simon swears that he called on Gribbie in January, 1895, and gave him an order to send to defendants samples of certain lines of goods. "Q. Just state why you merely ordered the samples? A. Because that is the only way my boys do business, as they have only a desk-room office. Q. When were those samples to be sent to your place? A. They were to be sent to our place after two weeks; they were to be sent two weeks after I was there in January. Q. You say in January, about when? A. May be between the 20th and 25th." He swears the goods were not sent in two weeks, and that in the commencement of February, 1895, Gribbie called at the defendants' office and had an interview with Simon and one of the defendants. "Q. This conversation took place, you say, about February? A. Yes. Q. And he (Gribbie) came there and asked for more time (in which to deliver the samples)? A. Yes, sir. Q. And your son (one of the defendants) gave him more time? A. Yes, sir; oh, a couple of weeks longer." He further swears that the goods did not come, and in the month of March, 1895, all orders were canceled, and defendants had nothing more to do with Gribbie until the goods arrived in May, when they were returned. "Q. In May, some cases

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came? A. Yes, sir. Q. Do you know what was inside of those cases? A. No, sir; they were not opened, they were returned by the United States Express. Q. And you returned them because it was too late to use the samples, your men had already gone on the road? A. Yes, sir. Q. Now, I believe you testified that all you ordered were samples? A Yes; nothing else. Q. That is all you were told to order? A. Yes." Although Simon swears so positively that all orders were canceled in March, 1895, and that defendants and he had nothing more to do with Gribbie after that until the goods were returned on or about May 25th, it appears that on May 6, 1895, he, on behalf of defendants, wrote as follows to Gribbie: "If convenient, by Friday next, the 10th, send us ¼ of a dozen each of the *samples selected by us, and also all other goods you are making*, including whisk and holder, toilet sets, etc., as we need three sets of samples, and if you make the prices right you may expect large orders very shortly. Please inclose invoice with samples, and oblige. Resp. Levy Bros." Also on May 24, 1895, he writes Gribbie, for defendants, as follows: "Mr. L. wishes to see you as soon as possible, yours resp. Levy Brothers, 86 Bond street, N. Y., L." On this subject, he is examined as follows: "Q. The goods they testified they sold Levy Brothers came to your place, you say, the day before you sent them back? A. Yes. Q. You sent them back on May 25th, so the goods came on May 24th, didn't they? A. No, I suppose the 23d. Q. That is the time you wrote this letter that you wanted to see him? A. Yes. Q. He has claimed that you ordered from him inkstands and buckles, didn't you? A. They were among the samples that I ordered. Q. This letter merely refers to whisk and holder, and other things? A. Yes, sir. Q. And does not have anything to do with these samples? A. No. Q. You would usually use two or three samples, and a quarter of a dozen is three? A. Yes, sir. Q. You were willing to take the samples ordered, if they were delivered in time. A. Yes, sir; if we could get them. Q. They were ordered in January, and on May 23d they came? A. Yes, sir. Q. Or at least some packages came? A. Yes, sir. Q. (By Mr. Fromme) But you are sure you canceled all orders in March? A. Yes, sir. Q. Are you sure of the dates when they were canceled? A. No. Q. These goods were to be delivered within two weeks after you ordered them? A. Yes, sir." The plaintiff's witness Demorest corroborates to some extent Gribbie. He swears he was present part of the time during the conversation between Simon and Gribbie. He says: "When I brought in the samples, Mr.

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Levy thought it was very nice; but the other subjects of conversation I have no recollection of, except what interested me, and that was when he was ordering goods; of course, that I heard. I heard all of it; but I don't remember it, because I had no use to remember any of the goods, except the orders." He admits that he is still in the employ of Gribbie, and has been for six or seven years. On cross-examination, he swears: "Q. But in the Levy case Mr. Gribbie had the customer, didn't he? A. Yes; then he always takes the order. Q. All you did was to walk in and out? A. That is all. Q. You were out of the room for some time? A. I was not in the room when he first came. Q. You don't know what conversation Levy had with Mr. Gribbie when you were not there? A. No. Q. And what these men said while you were out to complete the sample, you don't know? A. No." When again called to the stand, Simon Levy swears positively that Demorest was not present when he gave the order to Gribbie.

It will be seen, therefore, that the whole case turns upon a sharply disputed question of facts, viz.: Did Simon Levy, in February, 1895, order three gross of inkstands, to be delivered after the 1st of May, 1895, as claimed by plaintiff; or did he, in January, 1895, order only samples, to be delivered within two weeks, which time was subsequently, in February, extended two weeks, as claimed by defendants? The letter of May 6, 1895, while apparently contradicting Simon's testimony that he had nothing more to do with plaintiff, after canceling all orders in March, 1895, can hardly be said to have any bearing on plaintiff's claim to recover; for plaintiff's claim is founded upon an alleged sale, in February, 1895, of three gross of inkstands, while the letter asks Gribbie to send to defendants, by the 10th of May, 1895, "¼ of a dozen each of the *samples* selected by us, and also all other goods you are making, including whisk and holder, toilet sets, etc., as we need three sets of samples; and if you make the prices right, you may expect large orders very shortly," etc. But be this as it may, the learned trial justice has found, upon this sharp conflict of evidence, in favor of the defendant, and we do not feel warranted in interfering with this finding. It is true that defendants' letter of May 25th, referring to the return of an invoice of goods, does not assign, as their reason, plaintiff's failure to deliver the samples within the two weeks, referred to, as the reason for the return, by Simon; but the letter states that the goods are returned "because all we wanted were samples of all your fancy goods, on which we could place orders by and by. But it seems you do not want to

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understand it that way. Besides we find the prices on your goods more suitable for the direct retail or drug trade, and, therefore, decline to handle your goods in our line." It would seem from the wording of this letter that it, like the one of May 6th, referred to some other transaction than that of the alleged sale, in February, of three gross of inkstands, as claimed by plaintiff. Simon was not interrogated with regard to this letter, but he does swear, as we have already seen, that the letter of 6th of May had nothing to do with the transaction that forms the basis of this action. It will be remembered that the goods were returned unopened by the defendants. This letter of May 25th, although attached to the record of an exhibit in the case, does not appear from the stenographer's minutes to have been introduced in evidence. But we refer to it for what it may be worth.

After a careful examination of the evidence in this case, and of the objections and exceptions taken by plaintiff in the course of the trial, we come to the conclusion that the judgment, so far as assailed on this appeal, should be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* JOHN KELLINA, Respondent.

(Supreme Court, Appellate Term, March, 1898.)

Action for a penalty for selling adulterated milk — Failure to prove a delivery.

In an action brought to recover the penalty imposed by the Agricultural Law (Laws of 1893, chap. 338, §§ 22, 26, 37, as amended by Laws of 1897, chaps. 554 and 768) for selling adulterated milk, it appeared that detectives examined the milk at 3 o'clock, a. m., at a ferry in the city of New York and found one can defective, that the defendant's driver, who was apparently merely bringing the milk from the ferry to the store of the defendant, informed him what had happened and that he immediately returned all the defective milk to the shipper by express.

Held, that the action could not be maintained, as there was no proof that the defendant was delivering milk to customers when the impure milk was detected, nor that he intended to deliver it.

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APPEAL from a judgment of the First Judicial District Court.

C. G. Macy, for appellant.

H. W. Leonard, for respondent.

GILDERSLEEVE, J. The action is brought to recover a penalty of $100, pursuant to section 37 of chapter 338 of the Laws of 1893, amended by chapters 554 and 768 of the Laws of 1897, known as the "Agricultural Law." Section 22 prohibits the sale of adulterated milk, section 37 provides for the penalty, and section 26 is as follows, viz.: * * * "Any dealer in any article or product, the manufacture or sale of which is prohibited by this act, who shall keep, store or display such article or product, with other merchandise or stock in his place of business, shall be deemed to have the same in his possession for sale."

The evidence shows that, in the early morning of July 23, 1897, two milk inspectors boarded the defendant's milk wagon, driven by one Wilder, and took some samples of the milk, which were examined by the government experts and found to be adulterated. Defendant swears that none of the milk was sold by him, but that it was all returned to the farmer, one Parsons, from whom defendant got it. His testimony is as follows: "Q. Do you remember the milk shipped to you by Mr. G. B. Parsons, on the 23d of July, last? A. Yes, sir. Q. Whom did you have in your employ? A. Wilder. Q. What was his business? A. He was driving my wagon; he went every morning and got milk at Jersey City, at the Pavonia ferry, and came over on the Twenty-third street ferry. Q. You remember when he came to your place, and complained that the inspector had examined the milk? A. He came, on the 23d, in the morning, when I got up, and delivered to me these cans of milk on the wagon, and a bottle from the inspectors; as he had always done, those days he was with me, he put six or eight or ten bottles of the milk in a box, and had them under seal; then, when he came and brought me that bottle, it was on the 23d, he then told me that the detective said the milk was not good, and they examined these cans and said five were all right and one not all right. Q. What did you do? A. I put the milk from the bottles into the can, and put it aside, and put it on the wagon, and brought it to the depot, and got a receipt from the company that I delivered it there. Q. Did you in any way, shape or manner use

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any of that milk? A. No." The government detective, Mr. McGuire, swears that he called on the defendant, and that defendant stated to him that "he returned all that milk, and had the bills of the railroad to show for it; he also stated that half of that can of milk, about twenty quarts, perhaps, was put into bottles, and he said he returned that milk into the can, and had shipped it all back, and had the railroad receipt to show." Defendant introduces in evidence a receipt of the Erie Railroad Company in the following terms, dated July 24, 1897: "Received from J. Kellina, two cans milk returned to G. B. Parsons, Oxford, Orange Co., N. Y." Parsons himself testifies thus: "Q. Did you receive any milk that was shipped that day? A. I did, both cans. Q. When did you receive it? A. I sent it the same as this evening, and the next evening I got it back. Q. The following day? A. Yes, sir; the earliest I could get it. Q. After the complaint of the milk from Kellina? A. Yes, sir; the name was tied on the handle of the can on the outside. Q. That it was supposed to be adulterated? A. Yes, sir. Q. You took the milk back? A. Yes, sir.

The learned counsel for the appellant calls our attention to the case of People v. Koch, 19 Misc. Rep. 634; in which case it is held by the Appellate Court, Daly, P. J., that "A milkman, going his rounds to daily customers offers and exposes his milk for sale at every step of the journey, and in case of its being detected as impure, he is not relieved from liability by the fact that he did not actually sell from the can from which the impure sample was taken, but returned it to the person from whom he bought it, in the absence of any proof that he intended to have it examined before delivery."

This authority is unquestionably controlling in the case at bar, if we can find any evidence to support the conclusion that defendant's driver was engaged in delivering milk to customers, at the time the impure milk was found in his wagon. The statute does not declare the mere possession of such milk unlawful, and it only applies where there is some action taken or intended to be taken by the person charged, whereupon traffic in the adulterated article may be founded. People v. Wright, 19 Misc. Rep. 135. Mr. McGuire, the inspector, swears that he boarded the wagon at three a. m., on Thirteenth avenue and Twenty-third street, near the ferry. "Q. Do you know what became of that milk after you left the wagon? A. No, sir. Q. You don't know where it was taken? A. No, sir." Defendant swears, as we have seen, that his driver went every

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morning and got milk at Jersey City, at the Pavonia ferry, and came over on Twenty-third street. Defendant's place of business was 400 East Seventy-second street. He swears that his driver, on the morning of the 23d of July, when defendant got up, came and delivered to him these cans of milk on the wagon and a bottle from the inspectors; that, as usual, he put up six or eight or ten bottles of milk in a box, and had them under seal; that then he told defendant about the inspectors' examination; and that defendant put the milk from the bottles back into the can, and put it aside, and then sent it back, on July 24th, to Parsons, without using any of it. This would seem to indicate that the driver was taking the milk from the ferry to defendant's place of business, when the inspectors boarded the wagon. It does not appear at what hour the driver got to defendant's place of business. The inspector says that, at the time of his boarding the wagon, one of the cans, the one inspected and found impure, was only half full. The only fact, from which we draw any inference that the driver was engaged in delivering milk, when raided, is that this can was half full and that the driver had put some milk into bottles. When and where the milk was so put into bottles does not appear. Defendant says these bottles were in a box and under seal, and that there were some six or eight or ten of them. The inspector says that defendant told him, and this is not specifically denied by defendant, that half of that can of milk, about twenty quarts, perhaps, was put into bottles, and that he returned that milk into the can, and shipped it all back to Parsons, at Oxford, Orange county.

In the Koch case, above cited, Mr. Justice Daly uses the following language, viz: "It was not necessary to show actual delivery to a customer, since he (defendant) admitted that he was in the act of delivering the milk when he was stopped. The fact that he subsequently returned this particular can to the party from whom he bought it does not bear upon the question in dispute, because it is not shown that he intended to submit the milk in his wagon to any examination or test before delivery. Had it been his purpose to do so, then he could not be convicted of offering the milk for sale at the time he was stopped; it it because, had he not been stopped, the milk would have been delivered to his customers, that the offense against the law was complete, and his convictions should have followed." It will be noticed that in the Koch case the defendant admitted that he was in the act of delivering the milk, when he was stopped. In the case at bar, on the other hand, the

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evidence is, as we have seen, very meagre as to whether he was engaged in delivering the milk, or whether he was merely taking it from the depot to defendant's place of business. It cannot be presumed that the defendant was engaged in an unlawful act. The presumption is that his conduct would be upright and honorable and in accordance with the law. It cannot be said that the testimony, adduced, points with reasonable certainty to the conclusion of guilt. The inference that the driver was on his way to the defendant's place of business, where an inspection was to be had, before offering the milk for sale, is quite as rational a hypothesis. There is no sufficient evidence to sustain a finding that the defendant's driver was delivering milk to customers, at the time the impure milk was found upon the defendant's wagon. His driver had, apparently, just received it from the shipper. There is no evidence of collusion with the shipper, and none will be presumed.

We are of the opinion that the trial justice reached a conclusion that is fully supported by the testimony, and that the judgment appealed from should be affirmed, with costs to the respondent.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs to respondent.

THE MAYOR, ETC., OF THE CITY OF NEW YORK, Respondent, *v.* NICHOLAS CELIA et al., Appellants.

(Supreme Court, Appellate Term, March, 1898.)

1. **Bond to support a bastard — Release of father by mother.**

A release, executed by the guardian of the mother of a bastard, in terms containing a release by the mother, for a valuable consideration, of any further obligation upon the part of the father, is not a defense to him, *pro tanto,* to an action upon a bond given by him to the People for the support of the child; and the release is inadmissible in any view, as the mother is not a party to and cannot affect the bond, either in his operation, force or continuance.

2. **Same — Breach.**

The neglect of the father to pay, according to the bond, is a breach of it, and the city need not show that it has actually paid money to support the child.

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APPEAL from a judgment of the Third Judicial District Court, in favor of the plaintiff.

M. A. Lesser, assistant corporation counsel, for respondent.

Edward McKinley, for appellants.

GILDERSLEEVE, J. The defendant, Nicholas Celia, gave a bond, under section 851 of the Criminal Code, with the other two defendants as his sureties, to pay $2.50 a week for the support of his bastard child. He defaulted in the payment of such weekly instalments, and the commissioners of public charities ordered suit to be brought, under sections 881, 882 of the Criminal Code, to recover total instalments then due, amounting to $100. By the terms of his bond, said defendant and his sureties are held and bound to the People of the State of New York, in the sum of $250, to be paid to the said People of the State of New York, in case of the failure of the said defendant to pay weekly and every week such sum of $2.50 for the support of such child.

On the trial, defendant sought to introduce into evidence an alleged release, claimed to have been executed by the guardian of the mother of the child, by which said mother released the defendant from all obligation to support the child, in return for the sum of $50, alleged to have been paid by the said defendant to the said mother. No offer is made by defendant to show that the child had been actually supported by its mother. This alleged release was ruled out, to which ruling defendant duly excepted; and judgment was given for the plaintiff. The question presented upon this appeal is (1) Did the exclusion of the alleged release constitute reversible error; and (2) Should the defendant have been allowed to prove that he had paid to the mother, for the support of the child, in addition to the amounts paid to the commissioners of charities, the sum of $50, on August 18th, the time of the alleged release, so that such sum might be credited on the $100 due on the bond?

We agree with the learned assistant corporation counsel that it was not necessary for plaintiff to prove the actual payment of money by the city authorities for the support of the child; but that the defendant's neglect to pay the sum, ordered to be paid for such support, was a breach of the undertaking, and the measure of the damages was the sum ordered to be paid, and which was with-

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held at the time of the commencement of the action, with interest thereon. Criminal Code, § 883. So far as the release purports to free the said defendant from the obligations of the bond, its introduction was entirely inadmissible. The bastardy undertaking was made to the People of the State of New York, for the purpose of insuring the support of the child. It was not given for the support of the mother. She is not a party to it, and she has no interest in it. She cannot, in any way, affect it, either in its operation, force or continuance. See People ex rel. Board of Police v. Shulman, 8 App. Div. 517. The power to compromise is vested solely in the commissioners of charities; and, as this function is judicial in its nature, as distinguished from a purely ministerial duty, it could not effectively be transmitted to another person. The evidence, sought to be introduced by defendant, that one Blake, who appears to have died before the trial, and of whose official position or authority no evidence is offered, had verbally consented to the release, was clearly inadmissible. No effort is made to prove that the commissioners of charities had ever sanctioned the release, or even knew anything about it.

With regard to the exclusion of the evidence, offered by defendant, to prove that he had paid $50 to the mother of the child, it must be held that there was no error in such ruling. The defendant paid the money, if at all, at his own risk, and with such payment the plaintiff is not at all concerned. Defendant's obligation was to pay to the commissioners of charities the sum of $2.50 a week, and he cannot avoid that obligation by paying $50 to another party, without authorization by the commissioners of charities, even if that other party was the mother of the child. See People ex rel. Board of Police v. Shulman, *supra*.

It, therefore, follows that the judgment appealed from should be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

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GEORGE A. SIPP, Respondent, *v.* THE SIEGEL-COOPER CO., Appellant.

(Supreme Court, Appellate Term, March, 1898.)

Evidence — An offer of compromise is not a proper basis of value.

An offer to compromise a claim for the use of trucks and wagons is not a proper element in reaching a conclusion as to the fair value of the use.

APPEAL from a judgment of the Thirteenth Judicial District Court, in favor of the plaintiff.

Rose & Putzel, for appellant.

J. C. Van Loon, for respondent.

GILDERSLEEVE, J. The issue herein presented by the pleadings and the testimony was as to the compensation which plaintiff was entitled to receive for the use of two trucks and three delivery wagons for, at the most, one full day. It was the claim of the plaintiff that the defendant admitted that the use of the trucks and wagons was of the value of $35. It was for this amount that the learned trial justice rendered judgment in favor of the plaintiff. A careful examination of the record fails to disclose any evidence to support this judgment. The evidence shows that plaintiff made a claim against defendant for $75, and that the correctness of this claim was disputed by defendant; and it further appears that, subsequent to the commencement of the action, defendant instructed its lawyers to pay $35 to the plaintiff, on obtaining from him a release. It is the contention of the defendant that this offer was made in order to compromise the particular claim, for which this action was brought, as well as other differences that existed between the parties to the action. However that may be, no payment was made and no settlement had. The action was not brought to recover upon the express promise of the defendant to pay the sum of $35, but was brought, as we have seen, to recover payment for the use of the two trucks and three parcel wagons, as appears by the record of the oral pleadings. Plaintiff claims, correctly, that the question of value was one of fact to be found by the justice before whom the action was tried. It would seem that the justice considered the defendant's letter, which was nothing more

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than a proposition to compromise, and the testimony as to what transpired between the parties, as evidence of the fair value of the use of the trucks and wagons; and consequently, he fixed, as we have said, the recovery at $35. This conclusion is clearly against the weight of evidence. There is no sufficient evidence to support such an award. The preponderance of evidence shows undisputably that the fair value of the use of the trucks and wagons in question did not exceed the sum of $7.

For the reasons above stated, the judgment should be reversed, and a new trial ordered, with costs to abide the event.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed, and new trial ordered, with costs to abide event.

HELEN B. ROBERTSON, Respondent, *v.* LOCAL UNION No. 64, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ETC., Appellant.

(Supreme Court, Appellate Term, March, 1898.)

Benefit societies — Prima facie evidence of liability.

Proof made in an action, brought to recover funeral benefits from a local union, that it neglected to notify the member, as required by the by-laws, that he was in arrears for two months' dues, that the moneys, nonpayment of which was alleged to exclude him from being "in good standing," had been deducted by it from his sick benefit money and that the president of the union added to a guaranty of his funeral expenses the words "Late brother in full benefit." is sufficient to make out a prima facie case for a recovery.

APPEAL from a judgment of the Municipal Court of the City of New York, borough of Manhattan, eighth district, rendered in favor of the plaintiff.

S. J. Cowen, for appellant.

Jacob Wolf, for respondent.

GILDERSLEEVE, J. The action is brought to recover the sum of $200, for funeral benefits due to plaintiff, as widow of James Robertson, deceased, pursuant to the constitution and by-laws of

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the defendant. It is undisputed that if deceased was in good standing at the time of his death, the plaintiff was entitled, under the constitution and by-laws of defendant, to recover. Section 89 of the by-laws provide that "when a member is indebted to his local union for any sum equal to two months' dues, he shall be notified in writing by the financial secretary, and when owing a sum equal to three months' dues, he is not in good standing and is debarred from all benefits until three months after all his arrearages are paid in full." The monthly dues were seventy-five cents. On the trial, the defendant's books were introduced without objection on the part of the plaintiff, and showed that on March 31, 1897, plaintiff's husband owed defendant $1.40; that on April 1, 1897, he owed the additional monthly dues of seventy-five cents; and on May 1, 1897, the further additional monthly dues of seventy-five cents, making $2.90; but that on May 3, 1897, the husband paid fifty cents, which reduced his debt to $2.40, a sum equal to more than three months' dues. On May 28th he died. Defendant, therefore, claims that he was not in good standing at the time of his death; and, consequently, under the section above quoted, plaintiff should not recover. On plaintiff's side it is shown that her husband, or she, on his behalf, received from defendant, during the illness of her husband, $5 a week during the first three months and $3 a week during the last three months, as sick benefit money, in accordance with the constitution and by laws of defendant, but that, on each occasion, when due, the defendant deducted from such payments the money owing by the husband to defendant for monthly dues, at the rate of seventy-five cents a month. Plaintiff swears: "Q. They did not pay you $5, and then you return to them 75 cents; but they paid you $5, less 75 cents? A. Yes, sir. Q. Did you give them 75 cents sometimes? A. They always took it out themselves. Q. Did they tell you it was for dues? A. Yes, sir."

Plaintiff also swears that she opened her husband's mail during his illness, but received no notice from the defendant that he was in arrears, nor was she told so by anyone. Defendant offers no evidence that any notice of the husband being in arrears even for two months' dues was ever sent to him, as provided for in the above-quoted section. See Shafer v. United Brotherhood, 22 Misc. Rep. 363. The defendant's secretary admits that deductions were made from the sick benefit money paid at various times to plaintiff, but asserts that such deductions were duly credited, and that, in spite of such deductions, plaintiff's husband was indebted

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to defendant for monthly dues to the amount of $2.40, at the time of his death. On cross-examination, however, he admits that he was not present at the payments to plaintiff, and he does not seem to have had any definite personal knowledge as to whether the deductions were made or not. He further swears as follows, viz.: "Q. How could he (deceased) have been in arrears, and the custom had been to take out the monthly dues, and yet these $10 were paid him (just before his death), and nothing taken out; how is it he could have been in arrears at that time? A. Can't the local pay as they see fit? Q. Was it not the custom to take it that way? A. If we make an appropriation for sick benefit, that is their business. Q. Is that the custom about deducting? A. Yes, sir; in this instance to keep him square upon the books, when he was taken sick, we gave him $10 right straight." The learned trial justice, who could observe the demeanor of the witnesses on the stand, was in a better position to judge which of the parties spoke the truth, and of the weight to be given to the evidence, than we are. See Simon v. Simon, 6 App. Div. 469, 470. To further support plaintiff's side, the evidence of deceased's son and plaintiff's Exhibit 1 show that the president of defendant, after the death of Robertson, signed a guarantee of payment of deceased's funeral expenses on the part of defendant, and added the words, "Late brother in full benefit."

Upon the conflict of evidence, the learned justice decided in favor of the plaintiff, and, as there is evidence to support this finding, his decision will not be disturbed. See 47 N. Y. Supp. 922; 12 Misc. Rep. 18; 9 id. 126; 16 id. 580; 7 N. Y. Supp. 765.

So far as the point, urged by appellant, that the complaint should have been dismissed at the close of plaintiff's direct case, on the ground that she had not proved the deceased to be in good standing, is concerned, we may say that, inasmuch as the construction and deductions most favorable to plaintiff were to be allowed on such a motion, there was no error in this ruling of the learned trial justice.

It follows that the judgment, so far as it is assailed on this appeal, should not be disturbed. Judgment affirmed, with cost.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

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BRIDGET DARCEY, Respondent, *v.* WILLIAM STEGER, Appellant.

(Supreme Court, Appellate Term, March, 1898.)

1. **Landlord and tenant — Presumption that the landlord shall pay water rents.**

Where both a lease and its assignment are silent as to which party shall pay the water rents of the premises, the presumption is that the landlord must pay them, and she cannot recover them of the subtenant.

2. **District courts of New York city — Restitution — Notice.**

An application for the restitution of money, paid upon a judgment of a District Court of New York city, subsequently reversed, must be made on six days' notice. Code Civ. Pro., § 3058.

APPEAL from a judgment of the Eighth Judicial District Court.

J. E. Duross, for respondent.

H. F. Loppold, for appellant.

GILDERSLEEVE, J. This case is submitted on the following agreed state of facts and question of law, viz.: The plaintiff leased certain premises to one Steuernagel, who subsequently assigned the lease to the defendant, with the written consent of the plaintiff; and "that since the lease was made, and the lessee (Steuernagel) went into possession of the premises, the lessee put in certain bar fixtures, which necessitated the use of croton water, and that, therefore, the assignee of the lease (defendant) having come into possession of that property, under an assignment, and consent by the landlord, and the transfer of that lease, the question is whether the assignee became liable for the croton water rents under that lease and assignment, to the amount of $23.

Both lease and assignment have been put in evidence. In the lease the clause, as to the tenant's paying the water rents, is stricken out. When the lease was assigned, nothing, so far as the record shows, was said as to who was to pay the water rents, and neither the assignment itself, nor the written consent of the plaintiff to such assignment of the lease, makes any reference whatever to water rents. Nothing appears in the record to show any understanding between the plaintiff and Steuernagel as to water

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rents, except so far as the erasure of that clause in the lease is concerned. All we have to go by is the lease, the assignment and the agreed state of facts, above set forth, for the little testimony, that was taken, is, practically, incorporated in that statement of facts. So far as the record shows, it appears that defendant had a right to assume, when he took the assignment of the lease, that no obligation was imposed upon him to pay such rents. The law imposes the obligation to pay the tax upon the landlord and, unless she and the tenant especially contracted that the latter should pay such tax, no obligation rested upon him to do so. See McAdam Land. & Ten. (2d ed.), § 89. The question suggests itself, Why did not the landlord make arrangement for the payment of the water rents, at the time she consented, in writing, to the assignment, if she wished to have the tenant assume that obligation? But, as we have seen, she remained, so far as the record shows, perfectly silent upon this point, although she must have known that no obligation to pay such tax was imposed upon the tenant by the lease. As we have said, there is nothing in the record to indicate that defendant had the slightest reason to suppose, when he took the assignment, that he would be called upon to pay the water rents.

Having reached the conclusion that, for the reasons above stated, the judgment should be reversed, it becomes unnecessary to discuss the other points raised by the appellant upon this appeal.

We may add that, while it clearly appears that the judgment, appealed from, has been paid in full by the defendant, we cannot recognize the application for an order for restitution, made by the counsel upon the argument, as a compliance with the provisions of section 3058 of the Code, and direct the return of the money paid upon the erroneous judgment. "Six days' notice of an application for an order for restitution must be given." Code, § 3058.

Judgment reversed, and new trial ordered, with costs to appellant to abide the event.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed, and new trial ordered, with costs to appellant to abide event.

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MICHAEL MURPHY, Respondent, *v.* BENJAMIN LEVY, Appellant.

(Supreme Court, Appellate Term, March, 1898.)

1. **Check — Failure of the holder to present promptly as discharging the drawer.**

   The failure of the holder of a check, drawn upon a local bank, to present it for payment during the business hours of the next regular day after its receipt, discharges the drawer, upon the subsequent failure of the bank, to the extent of the loss which he sustained by the failure to make prompt presentment.

2. **Same — Drawer's subsequent promise to pay must be made with knowledge of dishonor.**

   A subsequent promise of the drawer, that he would make the check good to the holder, is not available, unless when he made it, the drawer had full knowledge that the check had not been duly presented and that it had been dishonored. Such knowledge, in the drawer, may be inferred from the circumstances.

3. **Same — Consideration.**

   When such a promise has a sufficient consideration.

APPEAL by the defendant from a judgment of the District Court in the City of New York, for the ninth judicial district, rendered by the justices thereof, without a jury, in favor of the plaintiff.

The opinion states the nature of the action and the material facts.

Wolf, Kohn & Ullman (Sol Kohn and Joseph Ullman, of counsel), for appellant.

Quincy, Wendel & Robeson (Robert J. Robeson, of counsel), for respondent.

GIEGERICH, J. This action was brought upon a check issued by the defendant upon the Murray Hill Bank, for the sum of $77, payable to the order of the plaintiff, and bearing date the 8th day of August, 1896.

The pleadings were in writing. The complaint averred the making of the check on or about August 8, 1896; demand and refusal of payment on or about August 12, 1896, and due notice thereof to the defendant; waiver of due presentment and notice;

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the collection by the defendant of a portion of the above-mentioned sum; and plaintiff's ownership of said check.

The answer admitted the making of the check; but denied plaintiff's ownership thereof and its due presentment; and averred the insolvency of the drawee, *laches* in presenting the check for payment, and loss, in consequence thereof, to its full amount. The answer further admitted the collection from the above-mentioned bank of a portion of the amount of the check, and alleged a tender to and refusal by the plaintiff of the same.

At the trial the complaint was amended by alleging the failure of the said bank, and that by reason thereof the necessity for presenting the check was obviated.

The answer, respecting these matters, was amended by denying knowledge or information thereof sufficient to form a belief.

Upon the uncontradicted proof these facts appear: That on Saturday, August 8, 1896, about half-past 8 o'clock in the evening, at the city of New York, the check was delivered by the defendant to the plaintiff, in payment of ice sold and delivered; that on Monday, August 10th, the latter delivered the check to the Knickerbocker Ice Company, in part payment of a debt; that on Tuesday, August 11th, at 11 o'clock in the forenoon, said Murray Hill Bank became insolvent and ceased to do business; that on the following day the check was presented for payment to the said drawee thereof at its place of business in the said city of New York; that the defendant had during the times above mentioned funds on deposit with said bank sufficient to meet the check, which, except as hereafter stated, were lost to him in consequence of the failure to present the check before the bank became insolvent; that the business hours of the bank in question were from 10 A. M. to 3 P. M.; that in September, the check was redeemed by the plaintiff, who paid the amount thereof to said Knickerbocker Ice Company, together with $1.30 protest fees, and that the defendant has since collected from the bank 25 per cent. of the amount called for by the check in suit.

The justice, in rendering judgment in favor of the plaintiff for the full amount claimed, decided that the holder of the check had all day Monday and Tuesday (August 10th and 11th) to present the check for payment, and, therefore, was guilty of *laches;* and that on the 12th day of August, the defendant "promised to pay plaintiff the amount of the check, if the latter would deliver it to him, and

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that such promise to pay was a waiver of any *laches* in the presentation and notice of nonpayment, if plaintiff was guilty of any."

The plaintiff seeks to uphold the judgment upon the grounds above stated, and there is, therefore, presented for review the correctness of the position thus assumed by the justice, and so sought to be supported.

It is well settled that where a check is delivered at the same place where the bank is located, it must, in the absence of special circumstances, be presented during business hours of the next regular day after it is received, and if the holder thereof fails to present it within the time required for payment, and the drawee becomes insolvent so that the drawer loses the entire amount of the check which he had on deposit to meet it, the latter will be discharged. Buckhalter v. Second Nat. Bank, 42 N. Y. 538; Syracuse, Bing. & N. Y. R. R. Co. v. Collins, 3 Lans. 29; affirmed, 57 N. Y. 641; reported more fully in 1 Abb. N. C. 50; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320; Sylvester v. Crohan, 138 id. 494; Grant v. MacNutt, 12 Misc. Rep. 20; O'Brien v. Smith, 1 Black U. S. 99; Edwards on Bills and Notes, 398; Daniel on Negotiable Instruments, § 1590; Norton on Bills and Notes (2d. ed.), 388. In case part of the money for which the check was given, is subsequently paid to the drawer, it will operate as a discharge *pro tanto*. Syracuse, Bing. & N. Y. R. R. Co. v. Collins, 3 Lans. 29, 32, and citations; Norton on Bills and Notes (2d ed.) 390.

Applying these authorities to the facts in the present case it must be held, that the check was presented too late, and, therefore, the defendant, as the drawer thereof, was discharged to the extent of the loss sustained by him by reason of plaintiff's *laches*, unless as claimed by the plaintiff the alleged promise of the defendant to pay the check operated as a waiver of due presentment and notice.

The evidence of such alleged promise is contained in the testimony of the plaintiff, who testified, that on Wednesday, August 12th, he had a conversation with the defendant, and the latter said, "That check will be coming back; take it up for me and I will pay you in bills;" that upon such occasion he informed the defendant of the delivery of the check by him to the Knickerbocker Ice Company; that subsequently, some four weeks before the trial, he requested the defendant to make the check good, which the latter refused, he saying, "That he would do as the bank did;" that defendant admitted, when such latter interview was had, that he had received from the bank 25 per cent. of the sum deposited with it,

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and said he would give that to plaintiff if he wanted it, without, however, offering the money.

The testimony of the plaintiff as to the alleged promise was contradicted by the defendant, who denied having made such alleged promise; and he further testified that he had no conversation whatever with the plaintiff concerning the check at the time mentioned; that at some time subsequent thereto, the plaintiff informed him that the check (which he had with him) had been returned by the said Knickerbocker Ice Company, and that he looked to the defendant for reimbursement; that defendant told him he could not give him the money and should look to the bank for it; that plaintiff declined to accept defendant's offer to pay the proportionate amount of the check received from the bank, and that the first knowledge the defendant had of the dishonor of the check was when said Knickerbocker Ice Company demanded payment thereof from him.

The rule is well established by adjudications that where the holder of negotiable paper has been guilty of *laches*, and that fact appears on the trial in an action against an indorser or drawer, the holder cannot recover on a subsequent promise without showing that such promise was made with full knowledge that there has been a want of due presentment and notice. Meyer v. Hibsher, 47 N. Y. 265; Ross v. Hurd, 71 id. 14; Haselton v. Colburn, 1 Robt. 345, and citations.

If the defendant knew that the bank had suspended payment four days after the check was delivered to the plaintiff and yet told the plaintiff that the check would be coming back, it is, to my mind, reasonable to infer, that he must have contemplated the fact that there had not been presentment within the day succeeding the delivery. There was, therefore, sufficient evidence in the case to warrant the conclusion that the defendant promised to pay the check, with full knowledge that there had been a want of due presentment and notice. While the justice would have been justified upon the evidence in finding either way, his determination of this controverted question of fact should not be disturbed in the absence of the elements which would justify such course on the part of the Appellate Term. Lynes v. Hickey, 4 Misc. Rep. 522.

The defendant urges that such promise to pay the check was without consideration, but the contention is not tenable. If the plaintiff was in nowise liable upon the check, his taking up the same upon the express promise of the defendant to reimburse him, is sufficient consideration to support the latter's promise, and is, in

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my opinion, a proposition too apparent to require the loss of time in discussion. On the other hand, if the plaintiff was liable as an indorser of the check, still as he might have had a defense to an action brought thereon by the Knickerbocker Ice Company, by reason of its *laches* in making timely presentation of the check for payment, his waiver of such defense by taking up the check in reliance upon the defendant's promise to reimburse him would also show a sufficient consideration.

For these reasons the judgment should be affirmed, with costs.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.

ROBERT STARR et al., Respondents, *v.* HARRIS SILVERMAN, Appellant.

(Supreme Court, Appellate Term, March, 1898.)

Conversion — A contract not creating an agency — Failure to prove a conversion.

In an action for a conversion, it appeared that, after the defendant had guaranteed to the plaintiffs sales of tobacco made and to be made by them to a third party, the litigants agreed that the third party should deliver to the defendant a certain number of cigarettes, at a price fixed per thousand, and that a part of the price per thousand should be paid to both the plaintiffs and the defendant. The defendant retained the whole sum.

Held, that the contract did not constitute defendant the agent of the plaintiffs, but created only a contract liability.

That the action for a conversion was not sustained by mere proof of the contract and its breach.

APPEAL by the defendant from a judgment of the District Court in the City of New York, for the fourth judicial district rendered in favor of the plaintiffs for $150 and costs, by the justice thereof, without a jury.

The nature of the action and the material facts are stated in the opinion.

George H. Epstein, for appellant.

Jacob Rieger, for respondents.

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GIEGERICH, J. This action was brought for the conversion of $150, under the circumstances hereafter detailed. The answer was a general denial, and a counterclaim for $485 was interposed.

On January 30, 1897, the defendant signed a paper writing whereby he guaranteed the payment to the plaintiffs of the sum of $300 for tobacco purchased, or to be purchased, from them by one Henry Goldman. Thereafter, and with a view of paying the indebtedness of Goldman, the parties litigant agreed, that Goldman should deliver to the defendant 150,000 cigarettes at the rate of $4.55 per 1,000, $2.55 of which was to be paid to Goldman and $2 to the plaintiffs; it being agreed that the said sum of $2 on each 1,000 cigarettes be deducted from the said purchase price in order to liquidate such indebtedness.

There is a conflict of testimony upon the question whether or not the $2 on each 1,000 cigarettes was to be paid upon the delivery of all, or part of, the goods, and there was, likewise, a conflict respecting the alleged tender by the plaintiffs to the defendant of 78,000 cigarettes, which Goldman had delivered to the former, by reason of the defendant's failure to pay the agreed price thereof. Pursuant to the said understanding, Goldman delivered to the defendant 75,000 cigarettes for which he was paid at the rate of $2.55 per 1,000, the defendant neglecting and refusing, however, to pay plaintiffs the $2 on each 1,000 cigarettes, amounting to $150, for the recovery of which sum the plaintiffs have brought this action.

Assuming, from the judgment, that the justice found that the said sum of $2 was payable on each 1,000 cigarettes, when delivered, I fail to perceive how the refusal to pay the same affords the plaintiffs the right to maintain an action for conversion. The agreement did not constitute the defendant the agent of the plaintiffs in respect to the $2 so to be paid on each 1,000 cigarettes, nor did it create a fiduciary relation on the part of the former towards the latter. It was, to my mind, simply an agreement to pay a certain sum upon the delivery of goods, the remedy for nonpayment of which being in form *ex contractu* and not *ex delicto*.

The action having been brought for a conversion, it was not sustained by mere proof of a contract and its breach (Walter v. Bennet, 16 N. Y. 250; Whitcomb v. Hungerford, 42 Barb. 177; Abbott's Tr. Ev., p. 626), and, hence, the exception noted to the refusal of the justice to dismiss the complaint was well taken.

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In my opinion, the justice also erred in excluding questions put to the plaintiff, Nathan Starr, on cross-examination, with a view of ascertaining the amount due plaintiffs from Goldman on the guaranty when the arrangement for the delivery of the 150,000 cigarettes was made.

For these reasons, to my mind, the judgment should be reversed, and a new trial ordered in the Municipal Court, borough of Manhattan, fourth district, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed, and new trial ordered in Municipal Court, with costs to appellant to abide event.

LEWIS H. GENTLES et al., Respondents, *v.* GEORGE FINCK, Appellant.

(Supreme Court, Appellate Term, March, 1898.)

Severing an entire demand upon contract — Distinct causes of action arising out of the same general work.

In an action brought to recover for work and materials, ordered by the defendant's agent, it appeared that the demand in suit was upon a special contract for varnishing sash, cleaning woodwork and puttying up mantels throughout a building and that it was agreed that the plaintiffs might charge $4 per day for a man's labor. A former contract had existed between the same parties for painting, in the same building, a partition in the cellar and stone wall and fence, not in the original plan. Upon this contract the plaintiffs were allowed to charge $2.50 for a man's labor. The plaintiffs presented to the defendant a general account, which included the several items of the two bills, and also brought an action and recovered judgment on the bill for painting the cellar partition, the stone wall and fence.

Held, that the recovery of that judgment was not a bar to the present action, as there had been no improper severance of an entire demand.

That the demands arose out of separate contracts, each of which gave rise to an independent cause of action.

APPEAL by the defendant from a judgment of the District Court in the City of New York, for the ninth judicial district, rendered

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in favor of the plaintiffs by the justice thereof, without a jury. The nature of the action and the material facts are stated in the opinion.

George Finck, appellant, in person.

Wayland E. Benjamin, for respondents.

GIEGERICH, J. This action was brought to recover the reasonable value of certain work and materials claimed to have been performed and furnished by the plaintiffs, at the request of one Fisk Trevett, who, it is alleged, was the agent of the defendant in the construction of a certain building in the city of New York. The answer, while admitting the defendant's ownership of the premises, denies the other allegations of the complaint and sets up *res adjudicata*. The reversal of the judgment is sought upon various grounds, which will be considered in the order in which they are stated in defendant's brief.

The defendant contends that the authority of Trevett to order the work in question has not been established. The uncontradicted proof shows that Trevett was the defendant's superintendent, and that at his request the plaintiffs performed certain work of the value of $134.95, described as follows. "Varnishing sash throughout the building, cleaning paste and water color from the woodwork, and puttying up and revarnishing mantels;" and that prior thereto the plaintiffs, at the request of Trevett, had painted "partition in the cellar and stone wall and fence that was not in the original plan;" for the recovery of the value of which work, namely, $38.95, the plaintiffs brought an action against the defendant, in which action they recovered judgment against the latter, upon the claim.

The evidence, to my mind, was sufficient to warrant the justice in finding (as is assumed from the judgment) that Trevett had ample power to bind the defendant for the work in controversy, and, hence, the motion to dismiss the complaint was properly denied.

The defendant contends, furthermore, that the cause of action herein is one of several items included in a general account rendered by the plaintiffs to him, and that they having recovered a judgment against him for one of such items, amounting to $38.95, such recovery is a bar to this action.

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It is well settled by numerous decisions in this state that an entire claim, arising either upon a contract or upon a wrong, cannot be divided and made the subject of several suits; that if they are bought for different parts of such a claim the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits; that several suits may, however, be maintained upon several causes of action, though they might be united in a single suit; that the distinction between a single and an entire demand or right of action, and which demands are several and distinct, is that the items of the former immediately arise out of the same act or contract, and the latter out of different acts or contracts; that where items of, on account, arise at different times, there must be an express contract, or else the circumstances must be such as to raise an implied contract, embracing all the items which may thus result in a single or entire demand or cause of action within the rule against splitting a cause of action. Secor v. Sturgis, 16 N. Y. 548; Erie & N. Y. City R. R. Co. v. Patrick, 2 Keyes, 258; Nathans v. Hope, 77 N. Y. 420; Zimmerman v. Erhard, 83 id. 74; Perry v. Dickerson, 85 id. 345; Millard v. Missouri, K. & T. R. R. Co., 86 id. 441; Byrnes v. Byrnes, 102 id. 4; Jex v. Jacob, 7 Abb. N. C. 452.

In Secor v. Sturgis, *supra*, the subject under consideration was discussed, and numerous authorities cited and commented upon. Strong, J., speaking for the court, at page 558, says: "Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements."

In Zimmerman v. Erhard, *supra*, there were separate sales of goods at different times upon a credit for a specified period, and it was held that such separate sales did not constitute an entire and indivisible demand, but that a cause of action accrued where the term of credit expired as to any one sale and the vendor might bring separate actions for each. In the case cited there was rendered, as in the case before us, an account containing all the items. The court, in passing upon the question raised in respect thereto, through Miller, J., at page 78, says: "The rendering of an account containing all the items does not change the nature of the contract or evince that the transactions were not separate and distinct. The cases cited to sustain the rule that the account sued upon was entire and could not be split up so as to form the basis of separate causes of action, are only applicable where successive

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suits are brought for separate items of a current account, or for separate instalments becoming due under the same contract."

In Perry v. Dickerson, *supra*, the plaintiff brought an action to recover damages for an alleged wrongful dismissal from the defendant's employment before the expiration of a stipulated term, and it was held that the judgment therein was not a bar to a subsequent action to recover wages earned during the time plaintiff was actually employed and due prior to the alleged wrongful dismissal, and that the two claims constituted separate and independent causes of action upon which separate actions were maintainable. Andrews, J., who wrote the opinion in that case, at page 349, says: "It is doubtless true, that the plaintiff could have prosecuted in one action, the claims for wages, and for damages for the wrongful dismissal. But it is not a test of the right of a plaintiff to maintain separate actions, that all the claims might have been prosecuted in a single action. A plaintiff having separate demands against a defendant on contract, or arising from distinct trespasses or wrongs, is not required to combine them in one action, although in most cases he may do so at his election. He may prosecute them separately, subject to the power of the court, in furtherance of justice, and to prevent undue vexation and costs, to order the actions to be consolidated."

The evidence touching the subject under consideration clearly shows that the work in suit was done under a separate and distinct contract. The plaintiff Bradley testified, that the work for the recovery of which the present action was brought, was done under a special contract made with Trevett, the defendant's superintendent, the terms thereof being that the plaintiffs might charge $4 a day for a man's labor; that the work for which a judgment was heretofore rendered was done pursuant to a special arrangement with Trevett that the cost of labor should be at the rate of $2.50 a day; that the witness kept a separate and distinct account of said last-mentioned work; that he rendered to the defendant separate bills for the work performed under the various contracts, including the items of claim in the former and present suits, respectively, and that he subsequently rendered a statement in which he included the separate bills before rendered. The foregoing testimony was not contradicted by the defendant, except as to the rendition of the separate bills.

There being no circumstances from which any implication could be raised of an understanding between the parties that there should

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be a running account, the justice was warranted in finding (as is assumed from the judgment) that there was none, and that there was a separate contract for the work in suit, upon which a separate cause of action arose. It follows, from these views, that the judgment in the former action is not a bar to the plaintiffs' right of recovery in the present suit.

The appellant seeks, furthermore, a reversal of the judgment for alleged error in the admission of evidence. We have not been referred to any specific exception, the appellant merely calling attention, generally, to all exceptions taken upon such subject, doubtless hoping thereby that the court, in the course of its examination of the record, would discover some ground for reversal. As in duty bound, we have examined with great care the exceptions referred to, as well as all others noted upon the trial, and fail to discover any substantial error which would require the reversal of the judgment.

The judgment should, therefore, be affirmed, with costs.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.

CHARLES WEBER, Appellant, *v.* SAMUEL MANHEIMER, Respondent.

(Supreme Court, Appellate Term, March, 1898.)

Services of attorney — Compensation — Cross-examination.

In an action brought to recover of an attorney a share of moneys which he had collected in suits brought, on behalf of the plaintiff, for the recovery of certain statutory penalties, the parties disagreed as to the defendant's compensation. He testified in regard to it, where the sum collected was $50, but the court refused to permit the plaintiff to cross-examine him as to the amount which he was to receive where less than $50 was collected.

Held, that the ruling was erroneous.

That, as the cross-examination related to a fact in issue and was intended to discredit the testimony of the defendant, the plaintiff had a right to pursue it.

APPEAL by the plaintiff from a judgment of the District Court in the City of New York, for the fourth judicial district, rendered

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by the acting justice of such court, without a jury, dismissing the action without costs.

The opinion states the nature of the action and the material facts.

Frank E. Hipple (Joseph J. Myers, of counsel), for appellant.

Samuel Hoffman (Samuel Schlesinger, of counsel), for respondent.

GIEGERICH, J. The plaintiff, by this action, seeks to recover certain moneys collected by the defendant, an attorney and counselor-at-law, in suits brought in his behalf, against divers persons, for a penalty imposed by a certain statute.

The defendant, while admitting the receipt of the sum he is charged with having collected, denied indebtedness to the plaintiff in any sum whatsoever, and set up a counterclaim for professional services rendered, at plaintiff's request, in twenty-six suits instituted in the Supreme Court, Orange county.

The parties litigant agree that when the defendant was first retained, it was understood, that he might charge $5 for each suit presented in a District Court in the city of New York, and that after the determination of such suits the defendant brought other actions in the Supreme Court, the venue being laid in Orange county. They disagree, however, as to the terms upon which the latter suits were to be presented, the plaintiff contending as to these, that there was to be no charge unless the defendant made a collection, in which event, his compensation was to be as follows: "Where the sum collected was $50, he was to get $10; where the sum of $35 was collected, he was to get $7.50, and where the sum of $25 was collected he was to get $5." The defendant, on the other hand, insists that nothing whatever was said between the parties concerning his fees.

Upon cross-examination, the defendant testified that many other suits were brought in the aforementioned county, in addition to the twenty-six suits in question, that settlements or compromises were effected therein, and that in each of the suits against one Moloney, one Meyer, and one Buchler, he retained $10 of the $50 penalty received. The plaintiff then sought to cross-examine the defendant, relative to the compensation charged or received by him in certain specified cases in which the sum paid was less than $50; but all evidence in respect thereto was excluded upon the objection of

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the defendant's counsel that it was "immaterial and not within the issue," the plaintiff noting an exception to each ruling.

I fail to perceive upon what theory the testimony so offered was rejected. The defendant had already testified as to his charges in cases where $50 was collected, when his counsel made the objections adverted to.

If it was material to show that fees were charged where a certain sum was collected, it was equally material to prove the compensation paid in all other cases where a compromise was effected.

The testimony sought to be introduced clearly related to a relevant fact, the sole question at issue being whether the parties had agreed upon the compensation of the defendant for services in the Orange county suits. It was, therefore, proper for the plaintiff to fully interrogate the defendant respecting the amount of compensation received by him where a penalty or a portion thereof was paid, the object of the questions so excluded, apparently, being to discredit the defendant's testimony upon said controverted question of fact, by showing upon cross-examination that his charges, in such cases, were made in conformity with the rates, which, according to the plaintiff's testimony, were fixed by the parties therefor.

Therefore, since this cross-examination related to a fact in issue and was directed towards the object of discrediting the defendant's testimony, the plaintiff had the right to pursue it (Platner v. Platner, 78 N. Y. 90, 95; Langley v. Wadsworth, 99 id. 61, 63; Baylies Tr. Pr., p. 179, and citations); hence, the exclusion of the testimony so offered was, in my opinion, error of so radical a nature as to necessitate a reversal of the judgment.

For these reasons, the judgment should be reversed and a new trial ordered in the Municipal Court, borough of Manhattan, fourth district, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered in Municipal Court, with costs to appellant to abide event.

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DORA BADESCH, Appellant, *v.* CONGREGATION BROTHERS OF WILLNA, Respondent.

(Supreme Court, Appellate Term, March, 1898.)

1. **Benefit societies — Construction of by-laws where they constitute the entire contract.**

   Where the entire contract of membership is embodied in the by-laws of a benefit society, all the by-laws must be considered and a beneficiary cannot claim the benefit of any one section to the exclusion of other sections.

2. **Same — By-laws limiting general benefits to members under forty-five years.**

   By-laws deemed to indicate an intention that general benefits shall be enjoyed only by members under forty-five years of age.

3. **Same — Parol evidence to qualify by-laws.**

   Parol evidence, as to what a member, over forty-five years of age, said when he paid money to the society and for what purpose he paid it, is inadmissible to qualify the effect of written by-laws.

APPEAL by the plaintiff from a judgment of the District Court in the City of New York, for the fifth judicial district, rendered in her favor, by direction of the justice, for the sum of $5.

Abraham H. Sarasohn, for appellant.

Alfred Steckler, for respondent.

GIEGERICH, J. The plaintiff is the widow of one Max Badesch, deceased, who, at the time of his death, was a member of the defendant corporation. She seeks by this action to recover certain benefits provided for by its by-laws, which, in part, provide:

"Article III. Sec. 1. No one shall become a member of the congregation if he or she is under eighteen years of age or above forty-five.

"Article III. Sec. 2. The designated price of the initiation, as it is written out in the fourth article is only unto the 45th year, but above 45 years the price shall be according to the resolution of the members of two-thirds majority, and then he cannot claim any benefits except cemetery and the other requirements for him and his family.

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"Article V. Par. 18. By the death of a member, or of his wife, the same receives everything necessary for the burial, a hearse, three carriages and minion during the week of religious mourning and attendance of ten during the week of mourning.

"Article V. Par. 22. If the deceased leaves him surviving a widow she shall receive from each member one dollar. Should there be no widow surviving, but orphans under the age of twenty years, unmarried, they shall see to it that the money shall be appropriated to the best interests of the orphan, and to call a special meeting right away to pay out that money, and whoever does not pay that money in the period of sixty days of the death shall be considered in arrears."

The deceased was between sixty-eight and seventy years of age when he joined the congregation, and at the time of his death had been a member for eleven years.

At the conclusion of the case each side moved for the direction of a verdict; and, while the plaintiff's motion prevailed, the justice, in his direction, restricted the verdict in her favor to the sum of five dollars, which is the amount provided by Article V, paragraph 7, to be paid to a member who has observed an entire week of mourning. The plaintiff's exception to such ruling, of course, limits us upon this appeal to a review of questions of law only. Stirn v. Hoffman House Co., 8 Misc. Rep. 246, 248, and citations. She insists that the justice erred in refusing to direct a verdict in her favor for the so-called endowment of one dollar from each member, as provided by paragraph 22 of Article V of the by-laws. This presents for determination a question as to the exact legal construction of a contract.

The contract of membership which existed between the deceased and the defendant corporation was only that embodied in the latter's by-laws (Hellenberg v. District No. 1, etc., 90 N. Y. 580; May v. N. Y. Safety Res. Fund Soc., 14 Daly, 390; Poultney v. Bachman, 31 Hun, 49; 2 Am. & Eng. Ency. of Law [2d. ed.], p. 1081), and, the plaintiff's claim being founded thereon, she must be held to accept it in its entirety. Therefore, the by-laws should be considered in their entirety as essential to a proper construction of any particular part, and the plaintiff cannot claim the benefit of any one section to the exclusion of another.

A careful scrutiny of the above cited provisions makes it clearly apparent that article III, section 2, expressly limits the benefits con-

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ferred by article V, paragraph 22, to members not over forty-five years of age. So obvious and reasonable, to my mind, is this conclusion, that no negative or restrictive words are required to authorize such an interpretation. *Expressio unius est exclusio alterius.*

The plaintiff also seeks a reversal of the judgment for alleged error in rejecting evidence. Samuel Badesch, a grandson of the deceased, testified to having accompanied the latter to meetings of the defendant corporation, and to seeing him pay money there and hearing him converse as to the amount paid and the object of its payment. The following question was then asked of him:

"Q. State what conversation you had and what you saw at the meeting of the congregation as to the amount of money paid by your grandfather, and for what he paid it?"

An objection as to the competency of this question was sustained, to which plaintiff noted an exception.

It is well settled that parol testimony cannot be received to contradict, vary, add to or subtract from a written instrument clear in its terms and complete on its face. House v. Walch, 144 N. Y. 421; Norton v. Woodruff, 2 id. 153; Wiggin v. Knights of Pythias, 31 Fed. Repr. 122. The ruling of the justice was, therefore, proper unless the plaintiff had been deprived from establishing by custom, or acts of the parties, a practical construction of that portion of the by-laws under consideration. Brooklyn Ins. Co. v. Dutcher, 97 U. S. 269; 3 Am. & Eng. Ency. of Law (2d ed.), p. 1082, *et seq.* This right, however, does not appear to have been denied the plaintiff, who could have interrogated the witness as to such subjects. This she omitted to do, however, and the exception taken is not available. Chase v. Senn, 13 N. Y. Supp. 266; 36 N. Y. St. Repr. 36. This disposes of all the questions raised by the appellant. We are satisfied, after a careful reading of the record, that the rulings of the justice were in all respects correct.

The judgment should, therefore, be affirmed, with costs.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.

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LUKE A. BURKE et al., Respondents, *v.* THE EDUCATIONAL ALLIANCE, Appellant.

(Supreme Court, Appellate Term, March, 1898.)

Contracts — Acquiescence in delay, after the time fixed for completion.

Semble, that where time is not of the essence of a contract, the assent of owners to an entire performance of a contract, after the day fixed for completion, precludes them from defeating an action for the contract price.

APPEAL by the defendant from a judgment of the District Court in the City of New York, for the ninth judicial district, rendered in favor of the plaintiffs by the justice thereof, without a jury.

The nature of the action and the material facts are stated in the opinion.

Benjamin Tuska, for appellant.

Cromwell G. Macy, for respondents.

GIEGERICH, J. This action is founded upon a contract for work, labor and services, and materials furnished in the construction of a roof garden on the building known as the Educational Alliance at the corner of East Broadway and Jefferson street, in the city of New York. The defendant seeks a reversal of the judgment solely upon the facts, there being no error of law charged. The main questions of fact presented for solution in the court below arose out of two counterclaims interposed by the defendant; one for $400, damages, claimed to have been sustained in consequence of plaintiffs' alleged failure to properly construct and adequately cover or protect the openings made by them in the course of their work, and the other for $14.50, the alleged reasonable value of certain spruce planking and a step-ladder, claimed to have been borrowed and taken by the plaintiffs from the defendant for the purpose of said work, and not returned, although duly demanded. The testimony relative to these subjects was conflicting, and a finding either way would have been warranted. The justice allowed the defendant $14.50 and gave judgment in favor of the plaintiffs for the difference. He had the witnesses before him, observed their manner of testifying, and, therefore, was undoubtedly better

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able to judge of their credibility and of the weight to be given to their testimony, than is this Appellate Court, and, hence, we see no reason for disturbing his conclusion in the absence of the elements which are requisite to a review of the facts. Lynes v. Hickey, 4 Misc. Rep. 522.

There was also litigated upon the trial, but not argued upon this appeal, the question whether the plaintiffs performed the contract within the specified time. The testimony adduced on the part of the defendant tended to show completion subsequent thereto, while according to that presented on behalf of the plaintiffs, the work was practically finished by the day designated. No claim, however, seems to have been made upon the trial for damages by reason of such delay, if any, in completion. Moreover, the evidence shows that the plaintiffs, with the assent of the defendant, proceeded, after the day designated, to complete the contract, and time not appearing to be of the essence of this contract, such claim alone, even if urged, cannot defeat a recovery of the contract price. Close v. Clark, 16 Daly, 91.

For these reasons, to my mind, the judgment should be affirmed, with costs.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.

THE EASTERN BREWING CO., Respondent, *v.* CHARLES FEIST, Appellant.

(Supreme Court, Appellate Term, March, 1898.)

Appeal — Excessive valuation of converted chattels.

Where the undisputed evidence as to the dilapidated condition of saloon fixtures, taken in connection with some of the chattels themselves, exhibited upon the hearing of an appeal, convinces the court that a trial justice has placed too high a value upon them, a judgment granting damages for their conversion must be reversed.

APPEAL by the defendant from a judgment of the Municipal Court of the City of New York, borough of Manhattan, first dis-

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trict, rendered in favor of the plaintiff, by the presiding justice, without a jury.

Action for a conversion of chattels.

The opinion states the material facts.

Greene & Johnson, for appellant.

Jay C. Guggenheimer, for respondent.

GIEGERICH, J. Upon a former appeal the judgment in favor of the plaintiff was reversed and a new trial ordered because it conclusively appeared from the evidence that plaintiff had notice of a prior incumbrance affecting the greater part of the recovery so had. 21 Misc. Rep. 681.

It is conceded by counsel for both sides, that the testimony concerning such prior lien was substantially the same upon both trials, and, therefore, it will be assumed that the plaintiff had due notice thereof.

The counsel for the plaintiff insists, that the rendition of a judgment for $95.16, damages and costs only, instead of $250, the amount demanded by the summons, shows that the justice, in assessing the damages, did not take into consideration any of the chattels covered by such prior incumbrance, and that hence the judgment conforms to the views expressed by the Appellate Term, through Mr. Justice Bischoff, upon the former appeal, and is warranted by the evidence.

The plaintiff's claim to the chattels is founded upon a chattel mortgage made by one Katie Gelb to it, to secure the payment of $350, on demand, and bearing date the 24th day of June, 1896. The defendant succeeded to the occupancy of the saloon, in which such articles were when the said chattel mortgage was executed, and he claims title to the front and back bar, and one three-tap lager beer pressure (part of the chattels claimed by the plaintiff), by purchase under a foreclosure of such prior lien, subsisting by virtue of a conditional bill of sale made by one Isidor Gelb to S. Fried and bearing date the 20th day of March, 1896; and the remainder of the chattels in suit, except screens and summer doors, hereafter mentioned, he claims to have purchased from one Abrahamowitz, and Schindler & Stemik, but the source of title of neither was proven. The articles claimed to have been converted by the

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defendant are, together with the value which the plaintiff's president placed upon each of them, as follows:

Bar and back bar	$125 00
Four tables	20 00
Two window screens	16 00
Twelve chairs	18 00
One three-tap lager beer pressure	60 00
One ice-box in cellar	60 00
Four chandeliers	20 00
One pair of summer doors	15 00
	$334 00

The testimony adduced in behalf of the defendant tends to show, that the ice-box, chairs, tables and chandeliers were in a very dilapidated condition and unfit for use.

The plaintiff, on the other hand, offered no proof in contradiction thereof.

Some of the chairs and tables were admitted in evidence, and exhibited upon the argument of this appeal, and these confirmed the testimony concerning them so far as we could observe.

If the above-described chattels were in the condition described by the defendant and the witnesses called by him, and their testimony upon this point was not contradicted, then manifestly the justice placed too high a valuation upon them, and a new trial should be had in the absence of other proof upon the subject.

For these reasons, to my mind, the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed, and new trial ordered, with costs to appellant

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JACOB BURKHARD, Respondent, *v.* THE GEORGE HAGEMEYER & SONS' LUMBER CO., Appellant.

(Supreme Court, Appellate Term, March, 1898.)

Appeal — Affirmance on a conflict of evidence.

Where the evidence upon the question, whether certain teams were furnished by the plaintiff to the defendant or whether they were furnished to a third person, is conflicting and evenly balanced, the judgment of the trial court must be affirmed.

APPEAL by the defendant from a judgment of the District Court in the City of New York, for the eleventh judicial district, rendered in favor of the plaintiff by the justice thereof, without a jury. The nature of the action and the material facts are stated in the opinion.

Richard B. Kelly (W. C. Beecher, of counsel), for appellant.

Lewis S. Goebel, for respondent.

GIEGERICH, J. This action was brought to recover the sum of $172.50, claimed to be due plaintiff for horses, harness and drivers furnished to the defendant, at its request, during the month of April, 1897. The issues in the action were joined by written complaint and answer, the latter containing a general denial. The substantial question of fact litigated upon the trial was, whether or not the horses were furnished to the defendant. The plaintiff claimed that they were, while the defendant denies having hired or used them, insisting that the same were furnished to one August K. Kaufold upon his request. There was sufficient evidence in the case to support a finding either way, and the justice having found for the plaintiff upon a conflict of evidence, we should not disturb his conclusion. Lynes v. Hickey, 4 Misc. Rep. 522.

We have examined with great care the exceptions taken at the trial to rulings respecting the admissibility of evidence and fail to discover the existence of any substantial error which would require the reversal of the judgment.

The judgment should, therefore, be affirmed, with costs.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.

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EMMA ULLRICH, Plaintiff, *v.* THE NEW YORK PRESS CO., Defendant.

(Supreme Court, Kings Trial Term, March, 1898.)

1. **Libel of one in an official employment — Privilege — Malice.**

   The publication by a newspaper of an article accusing an official city nurse of maltreating and neglecting infant waifs, committed to her charge as an employee of a board of charities and corrections, is not qualifiedly privileged; and hence she may recover her actual damages, although the publication was not malicious, as malice has no bearing upon the action, except upon the question of punitive damages.

2. **Malice — Damages.**

   Malice is a necessary element to the recovery of actual damages where the libel is qualifiedly privileged, but, in all other actions of libel and slander, it is not necessary to the recovery of actual and bears only upon punitive damages. It may be found from spite or ill will, or, failing these, if the publication is made in reckless disregard of the rights of the plaintiff or of those of other persons in general.

ACTION for libel. Motion on the minutes to set aside a verdict for the plaintiff. The plaintiff was employed by the Board of Charities and Correction to receive and care for all infant waifs abandoned in the streets or public places of the city of Brooklyn, and was called City Nurse. The libel accused her of mistreating and neglecting them.

James C. Cropsey for plaintiff.

De Lancey Nicoll for defendant.

GAYNOR J.: Defamatory words, the occasion for the publishing of which was qualifiedly privileged, are not a foundation for an action for libel if published in good faith; and, such privileged occasion being pleaded as a defense and shown, they are always presumed to have been published in good faith, unless the contrary be shown. An action for libel may not therefore be maintained upon them, unless the plaintiff prove that the defendant published them from malice. Such proof deprives the defendant of his privilege. The general rule in respect of publications not privileged is the contrary of this; viz., no malice need be shown in the defendant in order to recover the actual damage (in which term I include

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nominal damage) caused by the libel. Malice is not an ingredient of the cause of action. The only ground for showing malice in such cases is in order to obtain smart money, in addition to the actual damage (Prince v. Brooklyn Eagle, 16 Misc. Rep. 186). Libels against public officials, or those in public employment, belong to this general rule. As early as 1809 it was held by the Supreme Court in this state that the publication of libelous matter touching a candidate for public office did not come under the head of privileged occasion (Lewis v. Few, 5 Johns. 1.) The same was again more plainly reiterated in 1827 in the Supreme Court, and in the same case on appeal to the Court for the Correction of Errors (Root v. King, 7 Cow. 613; 4 Wend. 113); and in 1880 it was held by our Court of Appeals, (citing the foregoing cases), that if one states of a public officer "that which is false and aspersive, he is liable therefor, however good his motives. A person in public office is not less to be protected than one who is a candidate for public office; and the law of libel must be the same in each case" (Hamilton v. Eno, 81 N. Y. p. 126). There was therefore no error in refusing to rule on the motion for a non-suit, and again when the requests to charge were presented, that the occasion of the publication of this libel was qualifiedly privileged, and that by reason thereof the plaintiff had to prove malice in the defendant in order to make out a cause of action. In *Hamilton* v. *Eno*, one of the head notes is as follows: "The official acts of the officer may be freely criticised, and the occasion will excuse everything but actual malice and evil purpose in the critic; but the occasion will not of itself excuse an attack upon the character and motives of the officer; to excuse this the critic must show the truth of what he has uttered." This seems to be inconsistent in its parts, and confusing. The first part of it seems to say that the "occasion" will excuse criticism of official acts, while the last part plainly says that if libelous it cannot be excused, except by the critic showing it to be true. As the criticism, if libelous, can only be excused by being proved true, I own I do not perceive what the first part means. If the criticism of official acts contain no false and libelous matter, "actual malice and evil purpose in the critic", are wholly immaterial, for they cannot make that which is true a libel. "Our laws allow a man to speak the truth, although it be done maliciously" (Baum v. Clause, 5 Hill p. 199). The publication of that which is not a libel, does not require the "occasion", or the law of privilege, to be called up for its protection or excuse.

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If what is published be not libelous, apart from privilege, then there is no question of privilege, but on the contrary, the publication is of right. Head notes like this afford some justification to learned counsel for requesting juries to be charged in like verbiage, and for contending that no publication concerning a public official is libelous, however false, if made in good faith, viz., in honest belief in its truth (Odgers, ch. 2, pp. 33-6; Campbell v. Spottiswoode, 3 B. & S. 769).

Nor do I on reflection perceive any error in the charge that if the defense of justification had not been made out, the plaintiff had the right to recover the actual damage sustained by her without regard to the motive of the defendant in publishing it, or even though its motive was good, or even laudable. I was not unmindful of the mass of *dicta* seemingly to the contrary that could be cited. But no one can fail on reflection to see how inadvertent and unauthoritative it all is; and we are not without precise authoritative discrimination against it. The bugbear and confusion of the law of libel is the statement so often found in some text books and judicial opinions, that malice in the defendant is essential to sustain the action. It is not so, except in the cases of defamatory matter which is qualifiedly privileged; and right there is the starting point of the confusion. It is not necessary to prove that the publication was malicious, in order to recover, except in these latter cases, where malice is essential, the same as in actions for malicious prosecution; and hence malice need not be pleaded (Root v. King, 4 Wend. p. 137; Viele v. Gray, 18 How. Pr., p. 565; Hunt v. Bennett, 19 N. Y. 173). No matter if there be a complete absence of malice, or even if the motive of the publisher be good and virtuous, he cannot escape paying the actual damage done, unless he justifies by proving the charge, any more than one who commits an unjustifiable battery may so escape. Even an accidental or inadvertent publication of defamatory matter is ground for an action for the actual damage done; and a lunatic is liable for the actual damage done by his libels, the same as for his other torts, though he is incapable of malice, and therefore not liable to smart money (Odgers, 2nd ed. ch. 9; Kron v. Schoonmaker, 3 Barb. 647). In *Williams* v. *Hays* (143 N. Y. 442) it is said that "perhaps" a lunatic is not liable for libel or slander, but the question was not considered. Mr. Townshend says (4th ed. sec. 245), "Insanity is a complete defense to an action for slander or libel", but the cases he cites for his text by no means bear it out. Mr. Odgers

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in his rare book discusses the matter with scientific discrimination. The authorities (diregarding all *dicta*) amount to no more than this, viz.: Proof of insanity may be given to disprove malice, and thereby prevent an award of smart money; and the insanity of the defendant may be proved to have been notorious, so as to show that few or no one could have believed him, and that hence the actual damage is little, or nominal; but this latter could not apply if the publication was not in the name of the lunatic. The use of the word malice in actions for libel or slander not of a qualifiedly privileged occasion, except as a basis for smart money, is wholly technical and fictitious, and has been mildly called "unfortunate" by learned judges who considered the matter (Odgers, *supra*). Malice is not an ingredient of the cause of action, and need not be pleaded or proved, except qualified privilege be pleaded as a defense, and is shown, in which case malice must be proved in rebuttal, in order to defeat the privilege. The word has no excuse for being uttered in an ordinary action for libel or slander, except on the question of smart money. "If the plaintiff has been injured in his character or his feelings by an unauthorized publication, it is the duty of the jury to award him a full compensation in damages, without reference to any particular ill-will which might have been entertained against him by the defendants" (Root v. King, 4 Wend. p. 139). If one "states that which is false and aspersive, he is liable therefor, however good his motives" (Hamilton v. Eno, 81 N. Y. p. 126). "The publication of a libel is a wrongful act, presumably injurious to those persons to whom it relates, and in the absence of legal excuse gives a right of recovery irrespective of the intent of the defendant who published it, and this although he had reason to believe the statement to be true, and was actuated by an honest or even commendable motive in making the publication" (Holmes v. Jones, 147 N. Y. p. 66). Nevertheless, I suppose it will continue to be repeated, illogical, unscientific, untrue and confusing as it is, that malice in the defendant is essential in order to recover any damage for a libel or slander. It would be a great relief to law students, counsel and courts if this were never repeated again, and if it were recognized that malice in the defendant is an essential only in an action for damages upon a qualifiedly privileged publication, and in a criminal prosecution for libel. The jumble in some modern text books on slander and libel concerning malice, actual malice, malice in law, malice in fact, implied malice and express malice (all derived from judicial utterances, it is true),

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is a striking testimony of the limitations of the human mind. Malice in the defendant in slanders and libels not privileged has to do only with the question of adding smart money to the actual damage. The plaintiff has to prove malice in order to recover smart money; that is all. Of course, under the early contention (for it was never allowed to become the rule; 2 Kent Com. 24; 3 Black. Com. 124), that the truth was no defense in a civil action for a libel if its publication was malicious, there was some excuse for such niceties concerning malice; but under the modern law of libel there is none. In criminal prosecutions for libel, where the truth is not always a defense, the word malice has not been much refined upon.

The charge that the jury might find malice from a wanton or reckless disregard of the rights of the plaintiff, or of others in general, in the preparation and publication of the article (if they found such to have been the case), and give smart money damages therefor, was, it seems to me, correct. Trial lawyers and trial judges have been used to the charge for generations, that if there be no evidence of previous ill-will or spite, to show malice in the defendant, nevertheless if the jury find that the manner and circumstances of the making of the publication, or the substance of the libel itself, show a wanton or reckless disregard of the rights of the plaintiff, or of others in general, they may find such malice, (viz., the malice which satisfies the law, and enables them to give smart money), from that alone. Nothing to the contrary of this is known to trial lawyers and trial judges, unless it is to be found in *Smith* v. *Matthews* (152 N. Y. 152). I own not to understand all that is said in that case. The actual decision of the court upholds the charge of the learned trial judge. The point in mind in charging the jury on this head in cases of libel, slander and other torts, is always of the malice which will warrant the infliction of smart money, and of the proof from which such malice may be legally found by the jury. The jury are not permitted to punish the defendant by a fine for light reasons, in addition to requiring him to compensate the plaintiff for all the damages actually done to him. I do not understand that the jury are to give smart money for any degree of "recklessness or carelessness" (Smith v. Matthews), without regard to whether it shows malice or not. On the contrary, I understand that a finding of malice is essential, but that a wanton or reckless disregard of the rights of the plaintiff, or of others in general, in making the publication, is depravity suffi-

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cient in law to support such a finding of malice (Viele v. Gray, 18 How. Pr. 564; Newell on Libel, (2nd ed. p. 318). In fine, smart money may not be based upon any degree of "recklessness or carelessness", but only upon such a degree thereof as shows a wanton or reckless disregard of the rights of others, and hence malice. Mere carelessness, without regard to its degree, never sufficed. I do not perceive any intention in the court in *Smith* v. *Matthews* to change what has long been in every day use in the trial of causes as the law in this respect, notwithstanding expressions used in the opinion. If it does make the change, it applies not merely to libels, but to all torts for which smart money may be given. I do not understand that smart money may be given for negligence, or fraud, or any tort, unless such tort be accompanied by a malicious intention to injure; and such intention must appear from evidence of actual ill-will or hatred in the defendant toward the plaintiff, or of wanton or reckless disregard of the rights of the plaintiff in particular, or of people in general, in the commission of the tort (Lane v. Wilcox, 55 Barb. 615; Sedgwick on Dam. 8th ed. sec. 364 *et seq.*). The motion for a new trial is denied.

Motion denied.

PHILIP STERNBACK, Plaintiff, *v.* YETTE FRIEDMAN et al., Defendants.

(Supreme Court, New York Special Term, March, 1898.)

1. **Duress — Pleading — Proximate cause — Acquiescence.**

Duress is an affirmative defense which must be pleaded.

Where it is claimed that a mother-in-law was induced to execute, as surety, a mortgage by a menace of harm to her son-in-law, the threat and its consequence must be apparent; and her acquiescence, equivalent to ratification, will prevent her subsequent repudiation.

2. **Mistake — Reformation — Proof.**

A mortgagor who seeks to reform a mortgage, as given by her mistake, and the defendant's fraud, must establish by the clearest evidence that the mistake was mutual, that a different agreement was intended by the parties, and that fraud has been exercised.

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3. Surety — When not exonerated.

A mortgagor, standing as surety, is not exonerated by the fact that the creditor permitted the principal to resume possession of securities which he had deposited with the creditor, where it appears that the principal acquired such possession through an accomplice and by fraud and against or without the consent of the creditor.

ACTION to foreclose a mortgage given to secure the debt of another.

The opinion sufficiently states the case.

Myers, Goldsmith & Bronner, for plaintiff.

Leventritt & Nathan, for defendants.

PRYOR, J. In an action to foreclose a mortgage given to secure the debt of another, the surety mortgagor defends upon three grounds: First, that the bond and mortgage were extorted by duress; secondly, by way of counterclaim, that the bond and mortgage should be reformed so as to express what is alleged to be the true intent of the parties; and thirdly, that the sum recoverable be reduced by the amount of securities claimed to have been surrendered by the plaintiff to the principal debtor.

No allegation of duress appears in the answer; but manifestly it is an affirmative defense, to be pleaded, too, with particularity. Lord v. Lindsay, 18 Hun, 484, 485. Supposing evidence of the fact, still an amendment of the answer is inadmissible, because it would substantially change the defense. Code of Civil Procedure, § 723.

But, in truth, here is no sufficient proof of duress. Conceding the efficacy of a menace of harm to a son-in-law to control the will of a mother-in-law, the threat and the consequence must be apparent. "It is not sufficient to establish duress to show that the threats were uttered; it must be shown that they constrained the will of the promisor and so induced the promise." Dunham v. Griswold, 100 N. Y. 224. Probably the defendant executed the mortgage to avert the impending receivership, but it is not duress to enforce one's legal rights; even by an arrest of the person. McPherson v. Cox, 86 N. Y. 472; Dunham v. Griswold, *supra*. The threat of criminal prosecution was by implication only (Metropolitan, etc., Co. v. Meeker, 85 N. Y. 614), but if direct and designed to

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coerce, it is not shown to have been effective. Barrett v. Weber, 125 N. Y. 18. The defendant herself does not pretend that her motive in making the mortgage was to save her son-in-law from punishment, and she admits the partial validity of the security, which, if got by duress, must be wholly void. Not until the trial did she intimate that her act was involuntary, and so long an acquiescence prevents its repudiation. A party from whom a contract has been wrung by duress must disclaim it on the recovery of freedom. Subsequent recognition is the equivalent of ratification.

The defendant alleges that by her mistake and the fraud of the plaintiff, the instrument in suit does not express the real agreement of the parties. If this be the fact, the remedy of reformation is an available defense. Pitcher v. Hennessey, 48 N. Y. 415; Born v. Schrenkeisen, 110 id. 55; Avery v. Equitable, etc., Society, 117 id. 451. But to authorize the relief, the defendant "must show a plain mistake made out by satisfactory proofs." Nevius v. Dunlap, 33 N. Y. 676. "To justify a reformation of the instrument the mistake should be as much to the satisfaction of the court as if admitted." Ford v. Joyce, 78 N. Y. 618. "A person who seeks to rectify a deed on the ground of mistake, must establish in the clearest and most satisfactory manner that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought." Roberts v. Derby, 68 Hun, 299, 303. "To justify the reformation of a contract, upon the ground of mistake, it must appear that the mistake was mutual, and the fact that a different agreement was intended by both parties must be established by evidence uncontrovertible, clear and convincing." Allison Bros. Co. v. Allison, 144 N. Y. 22.

Upon an attentive examination of the record, I am unable to conclude that the bond and mortgage in question do not embody the mutual agreement of the parties. On the contrary, the preponderance of proof, in my judgment, is that the defendant understood and assented that the mortgage should be a security as well for the return of plaintiff's capital as for the general indebtedness of the firm. At the time of execution the papers were read aloud in the presence of the parties; and even if Rosenthal did make protest against the stipulation for securing the $10,000, the defendant nevertheless signed the instruments and duly acknowledged

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their execution. True, there is testimony of a promise on behalf of the plaintiff to expunge the obnoxious clause, but the statement is incredible. When a moment of time and a dash of the pen would have sufficed for the alteration, the folly of the defendant in deferring it, in confiding it to the party, who, she says, had fraudulently interpolated the provision, and in not promptly assuring herself of the correction or else repudiating the paper, evinces a stupidity which she did not display as a witness. Though an illiterate woman, she is not blind in the perception of her own interests; and there were those about her who would have rescued her from the perils of such improvidence.

In view of the contradictions between the adverse witnesses and the opposite inferences to be drawn from the circumstances of the case, the language of Van Brunt, P. J., may be adopted with propriety: "The evidence is conflicting; the witnesses seem to be equally reliable; both are supported by certain circumstances attending the negotiations, * * * and one or other of the parties must have knowingly testified untruly. There is not that preponderance of evidence — that proof, clear and decisive — which would justify the court in reforming the contract." Little v. Webster, 1 N. Y. Supp. 315, 316.

Nor does the evidence authorize the inference of fraudulent contrivance in procuring the mortgage. To establish the fact a clear preponderance of proof is indispensable; but the most that may be claimed by the defendant is that the evidence is not inconsistent with such conclusion. This is not enough. Schultz v. Hoagland, 85 N. Y. 464, 467.

It is insisted, finally, that by suffering the principal debtor to resume possession of securities which he had deposited with the plaintiff, the latter has so far exonerated the defendant surety. The rule is elementary, that "if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the security." Pollock on Contracts, 251; Hubbell v. Carpenter, 5 Barb. 520, 531. The infirmity of the defense, however, is that here the debtor got possession of the securities against the will and without the fault of the plaintiff. The proof is clear, that neither he nor those who were acting for him intended that the debtor should have the securities but with the consent of the defendant. They declined to deliver the securities to the debtor, and sent them instead to the defendant; but the debtor intercepted the messenger, corrupted his fidelity by blan-

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dishments and a bribe, and so fraudulently obtained custody of the securities. They were delivered to the accomplice of the debtor, in disregard of the agent's duty, and to serve a purpose of his own inconsistent with his principal's interest. "When an agent abandons the object of his agency, and acts for himself by committing a fraud for his own exclusive benefit, he ceases to act within the scope of his employment, and to that extent ceases to act as agent." Henry v. Allen, 151 N. Y. 1, 11; Benedict v. Arnoux, 154 id. 715, 729; Bienenstok v. Ammidown, 155 id. 60.

Again, the doctrine which the defendant invokes "has no application to a case where the principal has himself fraudulently abstracted the very collateral which he had previously pledged." McShane v. Howard Bank, 10 L. R. A. 552, 557.

Judgment for plaintiff pursuant to the prayer of the complaint, but without costs.

Judgment for plaintiff, without costs.

JOSEPHINE F. CLASON, Plaintiff, *v.* THOMAS E. STEWART, as Administrator with the Will Annexed of ELIZABETH CARTER, Deceased, Defendant.

(Supreme Court, New York Special Term, March, 1898.)

Action to quiet title — Estoppel by acquiescence — Possession by tenants.

In an action, brought under section 1638 of the Code of Civil Procedure, by one claiming as devisee of the fee, to quiet the title to a lot in the city of New York, it appeared that the defendant was the administrator with the will annexed of Elizabeth Carter. Under an irregular tax sale, had in 1859, Mrs. Carter became, in 1861, entitled to a tax lease for 500 years. Proof as to possession was meagre from 1861 to 1872, when Mrs. Carter leased the premises for twenty-one years to persons whose assignee took possession in 1875. While an action brought against the tenant in possession by Mrs. Carter was pending, and after 1884, she died leaving a will by which she appointed the plaintiff and another executors. They qualified and acted. In 1886 the plaintiff first learned of her rights and brought an action against the same tenant to recover the premises. In 1892 the plaintiff succeeded in her action and has since remained in possession by her tenants. In that action she made no mention of the tax lease of Mrs.

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Carter and, for this act of hostility to the estate of Mrs. Carter, the plaintiff was removed as executor, and the defendant was appointed administrator, with the will annexed.

Held, that the plaintiff was not estopped from maintaining the action by her acquiescence in former years, nor by her assumption of the duties of executor of Mrs. Carter and that, at the most, her rights were merely suspended during her executorship. That, under the provisions of section 1638 of the Code of Civil Procedure, as amended in 1891, the action was maintainable by a person merely in constructive possession by tenants.

ACTION to compel the determination of a claim to real property.

George W. Stephens, for plaintiff.

E. H. Benn, for defendant.

RUSSELL, J. This action is brought to quiet the title to the lot No. 42 Sheriff street, in the city of New York, claimed by the plaintiff in fee. Code Civ. Pro., §§ 1638, 1639. The plaintiff's father was the owner and by his devise and the death of her brother she became seized in fee-simple, now embarrassed only by the claim of the defendant as representative of the interests of Elizabeth Carter, deceased.

Mrs. Carter's interest was derived from a sale made by the city of New York for taxes in 1859 on which a lease was given for the term of 500 years to Robert Bruce, who assigned his certificate of sale to Mrs. Carter, to whom the lease was executed and delivered on the 28th of October, 1861.

It is very evident that some of the initial proceedings, as well as those subsequent to the sale for taxes, were defective; and the regularity of the tax title is not seriously contended for by the defendant's counsel. Nor does he claim that the statute making the certificate conclusive proof of the regularity of the sale applies to render valid defects occurring before or subsequent to the sale. But the defendant's counsel strenuously urges that acquiescence of Miss Clason for many years has produced an estoppel which prevents her now from asserting her actual title.

The proof is meagre as to possession from 1861 to 1872, but on the 13th day of that year Mrs. Carter leased the premises to John Baldwin for twenty-one years from May 1st. He assigned the lease to Julia Levy and Rose Baldwin who, in January, 1875, as-

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signed the lease to John R. Baldwin, who took possession and agreed to pay the rent. In 1884, George R. Baldwin, the purchaser of the last-named lease, died, leaving Elizabeth S. Baldwin, executrix. An action was begun by Mrs. Carter against this executrix for rent, which was defended, and, pending that action, Mrs. Carter died, leaving a will appointing the plaintiff, Miss Clason, and William H. Jacob executors. They took upon them the duties of their trust, stepped into Mrs. Carter's place in the suit against Mrs. Baldwin, and obtained a citation from a surrogate compelling her to account.

About the year 1886, Miss Clason, presumably, became aware of her rights on account of the defective character of the tax sale proceedings, and brought an action against Baldwin, to recover possession, which was awarded to her in June, 1892, she then taking actual possession and since continuing in possession through her tenants. On the trial of that action, though one of the executors of Mrs. Carter, she made no allusion to the tax lease held by the estate of Mrs. Carter, and for this act of hostility to the interest of that estate, she and her coexecutor were removed and the defendant, a creditor of Mrs. Carter's estate, was appointed administrator with the will annexed.

Miss Clason's recognition, in the performance of her duties as executrix, of the interest of Mrs. Carter, and failure to make any objection to her title for years before, are now claimed to constitute an estoppel against her, notwithstanding that she seems to have asserted her claim as soon as information came to her of the defects in the tax title. The well-known rule that a person cannot stand by and see another take title, whereby great loss would occur if the title were invalid, and thereafter assert her own concealed title to produce that very loss, is urged by the counsel for the defendant to defeat the otherwise legal title of the plaintiff.

Such is not the present case, however. Miss Clason received none of the benefits derived from the purchase of the certificate of sale by Mrs. Carter; her action or silence had no apparent effect to induce Mrs. Carter's purchase; the proceedings of the city were *in invitum*, or a virtual seizure of property to pay taxes, which the plaintiff might at any time resist when knowledge came to her that defects existed, unless a defective title had ripened by limitation into a legal one.

Nor did her acts as executrix estop her except concurrently with her tenure as executrix. While acting as executrix, it was her duty

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to prosecute all remedies pending for the benefit of the estate, especially where the tenant could not dispute the title of the landlord; so that Miss Clason's title was no defense in that action, and also where the executrix acted in ignorance of her own rights. Her paramount duty during her trusteeship was to the estate she represented, as was decided in a collateral proceeding with reference to this very property. Matter of Jacob, 5 App. Div. 508.

Released or removed from this duty, her own legal rights sprang into being, unless by their enforcement the estate was deprived of rights which it would not have lost but for her action as trustee. Collins v. Hydorn, 135 N. Y. 320.

There is no right which the estate of Mrs. Carter had in the property in question, but that the defendant here might assert, unclouded by any act of the plaintiff, Miss Clason during her tenure as executrix. There can be no estoppel of the plaintiff from here asserting her actual, honest, ownership of the premises in question.

The right to maintain this action is given, by section 1638 of the Code of Civil Procedure, to a person who has been for one year in possession of real property or any undivided interest therein, claiming an estate in it not less than a ten-year term. By the amendment of 1891 the word "actual" was eliminated before the word "possession," showing that a constructive possession, as through tenants, is sufficient. The possession of the tenant is only a personal interest; underlying it is the seisin of the plaintiff as the freehold owner. Her action will lie, therefore, although the property is physically possessed by her tenants.

Judgment is directed for the plaintiff, adjudging that she is the owner in fee of the premises, and barring and foreclosing the defendant from all right, title or interest therein, with costs against the defendant.

Ordered accordingly.

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ARTHUR W. BARNARD, Plaintiff, *v.* LOUIS FITZGERALD et al., Defendants.

(Supreme Court, New York Special Term, March, 1898.)

Railroads — Construction of a reorganization agreement — Modifications of plan.

A reorganization committee of the insolvent Union Pacific Railway Company was, by an agreement with the share and security holders, given unlimited powers in the matter, subject, however, to the proviso that the new securities to be issued should not exceed $100,000,000 and that no modification of a plan, proposed as of October 15, 1895, should be made unless a notice thereof should be advertised in a certain manner and also lodged with certain named depositaries. On January 26, 1897, the committee issued a mere written announcement to the effect that, apparently, no material modification of the plan would be necessary except that, for reasons suggested, it might be necessary to limit the issue of 4 per cent. first-mortgage bonds to $75,000,000, instead of $100,000,000, as originally proposed for reorganization purposes, "reserving the balance, under careful restrictions, for the future needs of the reorganized company, thus materially enhancing the standing and value of both the bonds and shares of the new company." A company was organized; it executed a first mortgage of $100,000,000 to secure bonds; it has issued $71,000,000 worth of bonds for reorganization purposes and proposes to issue about $90,000,000 in all. On June 25, 1897, the committee published a statement declaring "operative the plan of reorganization, dated October 15, 1895, with the modifications heretofore published." A stockholder brought this action to restrain the committee from issuing bonds for reorganization purposes to an extent greater than $75,000,000, claiming that he had paid the assessment, levied upon his stock, in reliance upon the written announcement of January 26, 1897.

Held, that the action could not be maintained.

That the announcement of January 26, 1897, was not designed to be an alteration of the plan, was not in the form required, was not published or deposited in the manner prescribed and that the committee had power to issue bonds up to the full amount of $100,000,000.

That the statement of June 25, 1897, declaring the original plan operative "with the modifications heretofore published" referred only to modifications which had been published and deposited in full compliance with the terms of the agreement.

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MOTION to restrain the defendants, constituting the committee for the reorganization of the Union Pacific Railway Company, from issuing, or causing to be issued, for sale, exchange or delivery, bonds secured by mortgage on the property and franchises of the Union Pacific Railroad Company, in excess of $75,000,000 for reorganization purposes.

L. J. Morrison and W. H. De Lancey, for plaintiff.

John E. Parsons, Victor Morawetz, and Winslow S. Pierce, for defendants.

CHASE, J. In the year 1893, the Union Pacific Railway Company became insolvent, and receivers of all the property of that company, and of the various other companies, embraced in its system, were appointed. In the year 1894, a committee was formed for the purpose of undertaking a reorganization of the system, and of adjusting the claims of the United States Government against its property. This committee was unsuccessful in its endeavor to effect an adjustment of the claims of the United States Government or of formulating a plan of reorganization and it was dissolved. Thereafter a committee consisting of the individual defendants in this action was formed and, on or about the 15th day of October, 1895, adopted and publicly announced a plan and agreement of reorganization. Provision is made in this plan for the creation of first mortgage railway and land grant 4 per cent. gold bonds to the amount of $100,000,000. By the plan it is provided that there shall be set apart for reorganization purposes $51,244,700, of the first mortgage bonds and certain specified amounts of the new preferred and common stock. The remainder of the new securities the plan provides shall be reserved to be disposed of for equipment obligations, for reorganization purposes, for settlement of the debt to the United States, and for extraordinary requirements.

The agreement further provides: "The depositors hereunder hereby request the committee to endeavor to carry into practical operation this agreement, including the foregoing plan of reorganization in its entirety or in part, to such extent and in such manner and with such additions, exceptions and modifications as the committee shall deem to be for the best interests of the depositors."

The agreement also provides: "The amount to be bid or paid

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by the committee for any property or franchises shall be absolutely discretionary with it; and in case of the sale to others of any property or franchise, the committee may receive out of the proceeds of such sale or otherwise any dividend in any form accruing on any securities held by it.

The enumeration of specific powers hereby conferred shall not be construed to limit or to restrict general powers herein conferred, or intended so to be; and it is hereby distinctly declared that it is intended to confer on the committee and each depositor hereunder hereby confers on the committee, in respect of all securities deposited or to be deposited and in all other respects, any and all powers necessary or expedient or which the committee may deem necessary or expedient in or towards carrying out or promoting the purposes of this agreement in any respect, even though any such power be apparently of a character not now contemplated; and the committee may exercise any and every such power as fully and effectively as if the same were herein distinctly specified, and as often as for any cause or reason it may deem expedient. And it is further understood and agreed that the methods to be adopted for or towards carrying out this agreement shall be entirely discretionary with the committee."

The agreement also provides: "The committee shall have absolute and complete discretion and latitude in the use, disposition, or distribution of all securities of the new company which are specified in the plan as reserved for purposes therein stated and which are in excess of the securities there embraced in the defined issues for reorganization purposes; and it may use, dispose of, distribute, or apportion any of such reserved securities of the new company in any manner and upon any terms which it may deem expedient or advisable to promote or accomplish the substantial objects and purposes of the plan and of this agreement."

The agreement also provides: "The committee may construe this agreement (including the plan of reorganization), and its construction thereof or action thereunder in good faith shall be final and conclusive. The committee may supply any omission or correct any error in the plan or in this agreement and may modify or depart from any provisions thereof which it shall unanimously deem not to be substantial.

"When in the opinion of the committee any change or alteration proposed is a substantial change, the agreement provides that a copy of the proposed change or alteration shall be lodged with each

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of the depositaries named in the agreement and a notice thereof shall be advertised in the manner specified in the agreement, namely, in two or more daily papers of general circulation published in the city of New York and in one or more daily papers of general circulation published in the cities of London, Boston, Amsterdam, and Frankfort, respectively, twice in each week for two successive weeks; and the agreement further provides that any holders of receipts or certificates of deposit who do not assent to such alteration may, at any time before a day specified in such advertisement, which date shall be at least twenty days after the first publication of such advertisement, withdraw the securities represented by their receipts or certificates of deposit upon surrendering their said receipts or certificates of deposit to the proper depositary."

The provisions of the agreement that I have quoted and other provisions of said agreement gave to the committee almost unlimited power and discretion in carrying out the plan and agreement for reorganization and in the use, disposition and distribution of all securities of the new company to be organized. The limitations of the committee consisted in an express provision that the total amount of new securities to be created as set forth in the plan ($100,000,000) shall not be increased and the provisions that I have quoted providing that when, in the opinion of the committee, any substantial change or alteration of the plan or agreement is necessary, a notice thereof should be lodged with the depositaries and advertised as stated.

The plan and agreement consisted of a statement setting forth the mileage, land possessions, funded and other debts, past earnings, and probable future earnings of the Union Pacific Railway system in detail; the proposed plan for the reorganization of said railway company and the proposed agreement between the defendants as such committee and the bond and stockholders of said company who should assent thereto. There was also attached to the plan and agreement, a circular containing a general statement on the part of the committee. Among other things the plan provided for an assessment on the common stock of the company at the rate of $15 per share. Prior to the 26th day of January, 1897, the agreement had been signed by a large part of the security holders of the Union Pacific main lines proper, inclusive of the Kansas Pacific line, and such security holders had complied with

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the conditions of the agreement. On that day the committee issued a written announcement stating: "The undersigned reorganization committee announces that, having reached an agreement with the United States Government (alike advantageous to the latter, as well as to the interest the committee represents), steps have been taken to promptly proceed with the reorganization. No material modification of the plan appears to be necessary except that the two classes of the junior bonds, viz.: Union Pacific sinking fund bonds and Kansas Pacific consolidated bonds upon final completion of the necessary arrangements may have to be offered a somewhat smaller allotment in new first mortgage bonds against an increased allotment of preferred stock, so as to enable the committee to limit the issue of new first mortgage 4 per cent. bonds (which under the plan was fixed at $100,000,000), to $75,000,000 for reorganization purposes, reserving the balance under careful restrictions, for the future needs of the reorganized company, thus materially enhancing the standing and value of both the bonds and shares of the new company."

This announcement also stated: "While modifications in the other features of the plan appear not to be required under present conditions, the committee deems it prudent to postpone the formal declaration that the plans all become operative until it feels assured that the carrying into final effect its arrangement with the United States Government will create no conditions other than now prevail."

The plaintiff is the owner of 500 shares of the common stock of the Union Pacific Railway Company which have been deposited in accordance with the agreement and on which the assessment has been paid. It is claimed by the plaintiff that the announcement made by the committee on the 26th day of January, 1897, was a substantial alteration and modification of the plan and agreement. He also claims that this announcement was published in various newspapers in the cities of the United States and on the European continent, and that the payment of the assessment on the common stock by the plaintiff and others was paid relying upon such announcement that but $75,000,000 of the new first mortgage bonds would be used for reorganization purposes and that the balance of $25,000,000 would be reserved for the future needs of the reorganized company. Pursuant to the agreement of October 15, 1895, a company has been organized known as the Union Pacific Railroad Company and the property and franchises

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of the Union Pacific Railway Company system have been purchased by persons representing the defendant the reorganization committee; and a first mortgage of $100,000,000 has been executed with the sanction of the directors and stockholders of said defendant the Union Pacific Railroad Company to secure bonds as provided by said agreement. Up to the present time $71,235,000 of these bonds have been issued and delivered and the proceeds used for reorganization purposes, and it is the intention of the reorganization committee that there be issued and delivered other bonds for reorganization purposes, in addition to those already issued and delivered, to an amount in all of $90,000,000. On the 25th day of June, 1897, the committee published a statement declaring "operative its plan of reorganization dated October 15, 1895, with the modifications heretofore published." It is claimed by the plaintiff that this announcement on the part of the committee was a declaration that the plan of October 15, 1895, was operative with the modifications specified in the announcement of January 26, 1897. The defendants claim that the announcement of January 26, 1897, was a circular merely, which by the express terms of the agreement was not to operate as a representation or as a warranty or as a condition of the deposit of securities thereunder. The announcement of January 26, 1897, was never lodged with either of the depositaries under the agreement; notice thereof was never advertised as provided by the agreement; neither was there any day specified therein, on or before which holders of receipts or certificates of deposit could withdraw their securities as provided by the agreement.

It is further asserted by the defendants that this announcement was never intended by them to effect a change, alteration or amendment of the plan and agreement of reorganization and that it was never adopted as such, but was advertised, to the extent it was advertised, for the purpose of announcing to the bondholders and shareholders the progress of the committee in carrying out the plan and agreement.

On the 26th day of February, 1897, the plan and agreement was modified by recasting the allotment of new securities applicable under its plan of reorganization to the Union Pacific sinking fund bonds and the Kansas Pacific consolidated first mortgage bonds, but no limit was placed upon the amount of the first mortgage bonds to be used by the committee for reorganization purposes; and, in the notice of the proposed change and alteration, a date

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was specified before which holders of receipts or certificates of deposit who did not assent to the alteration could withdraw their securities as provided by the agreement. There is nothing in the papers before me justifying even a suggestion of bad faith on the part of the committee. By the express terms of the agreement of October 15, 1895, an alteration that, in the opinion of the committee, would make a substantial change could only be made in the manner specified in the agreement. The announcement of January 26, 1897, does not specify a date before which holders of receipts or certificates of deposit, who did not assent to the alteration, could withdraw their securities as provided by the agreement. This announcement does not purport to be in the form provided by the agreement for the purpose of altering or modifying the agreement. On the face of this announcement it is evident that the committee did not intend the same as a modification or alteration of the agreement of October 15, 1895, but it merely shows that the committee did contemplate the possibility or probability of modifications of the plan at some future time. This announcement was never deposited or advertised as provided by the agreement where a change and alteration was intended, and even if the same had been deposited and advertised it is doubtful whether the same would be binding on the part of the security holders for the reason that it does not specify or purport to specify a date on which nonassenting security holders could withdraw their securities. When the committee announced on the 25th day of June, 1897, that the plan of reorganization dated October 15, 1895, with the modifications heretofore published, was operative, it must be assumed that they referred to, and they did, in fact, refer to the alterations made in accordance with the express provision of the original agreement.

I am of the opinion that the announcement of January 26, 1897, was not intended as a change of the original plan and agreement and, as the same was not lodged with the depositaries or published in accordance with the agreement, the committee are not bound thereby and the statement therein did not constitute a representation or warranty binding upon the committee or a condition of the deposit of securities thereunder; and the committee now have full authority in their discretion to use $90,000,000 or any other amount, not exceeding $100,000,000, of the first mortgage bonds of the new company for reorganization purposes.

Motion denied, with costs.

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THE PEOPLE EX REL. DELAWARE & HUDSON CANAL Co., Relator, v. EDWARD P. BARKER et al., as Commissioners of Taxes and Assessments of the City of New York, Defendants.*

(Supreme Court, New York Special Term, November, 1897.)

1. **Taxation of the capital stock of corporations — Assessment of real estate.**

Where commissioners of taxes allege, in their return to a writ of certiorari, issued to review the assessment of a railroad corporation, made under chapter 456 of the Laws of 1857, that they have accepted as true all the statements of fact contained in its verified inventory submitted to them, they must accept a statement of the inventory that the actual value of certain real estate, situated outside of the city and county, does not exceed an assessed valuation of it which has been made and is stated; and the commissioners cannot, subsequently, in assessing the capital of the corporation, include the real estate in their estimate at its cost.

2. **Same.**

A statement that the actual value of real estate, whose assessed valuation is stated to be unknown, does not exceed its cost, justifies its assessment at cost.

3. **Same — Foreign real estate is not taxable.**

Real estate, located outside the state of New York and held by a railroad corporation, is not a factor in assessing its capital and is to be entirely excluded from the assets.

CERTIORARI to review assessment upon the property of the relator.

David Willcox, for relator.

Francis M. Scott, counsel to the corporation (James M. Ward, of counsel), for defendants.

BEEKMAN, J. The relator insists that the commissioners in the process of assessing its capital for purposes of taxation had no legal right to include the value of its real estate at any other sum than its assessed value, or, in other words, to consider the real estate at all as a factor entering into an assessment under chapter 456 of

*Received too late for insertion in proper place.— Rep.

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the Laws of 1857, which regulates the manner of making such assessments. I dissent from this view for the reasons which I have given in the case of People ex rel. New York Clearing House Building Co. v. Barker, post page, 192, and which it is unnecessary here to repeat. In addition to this, however, a controversy arises over the following items which are contained in the verified statement which was furnished to the commissioners of taxes by the relator: (1) "Amount invested in real estate situated in the state of New York, but outside of the city and county of New York, $6,201,233.55; this sum is the actual cost of said real estate and the amount at which it is included in the total gross assets of the company as above stated; the assessed valuation of the same is $2,559,950; the actual value of said real estate does not exceed that sum." Notwithstanding the fact that the commissioners in their return aver that they accepted as true all of the statements of fact contained in the verified inventory submitted by the relator, they have included this real estate in their estimate at its cost, and deducting the assessed valuation, have thus assessed the relator here by reason of this item in the sum of $3,641,283. This, I think, they had no power to do. The verified statement in express terms declared that the actual value of the property did not exceed the sum of $2,559,950, at which it had been elsewhere assessed. This was a statement of fact which under the sweeping and unqualified acceptance of all that the verified statement contained, the commissioners were bound by and should have followed. Admitting, as they must be held to have done, that the value did not exceed the sum last mentioned, they had no right to estimate this property at any higher valuation. (2) "Further amount invested in real estate situated in the state of New York, but outside of the city and county of New York, $1,080,011.65; this sum is the actual cost of said real estate and the amount at which it is included in the total gross assets of the company as above stated; the actual value of said real estate does not exceed that sum; the assessed valuation of the same is unknown." In a supplementary statement, which is annexed to the return, the relator states that the asssessed valuation of this property does not exceed 60 per cent. of its actual cost as above stated. I find no error in estimating the value of this property at its cost. The latter was a measure of value which the commissioners were entitled to consider, and from the statement that the value did not exceed the cost, it was a legitimate conclusion that it at least

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equalled it. (3) "Amount invested in real estate outside of the state of New York, $13,374,753.10; this sum is the actual cost of said real estate and the amount at which it is included in the total gross assets of the company, as above stated; the actual value of said real estate does not exceed that sum; the assessed valuation of the same is unknown." In the supplementary statement which was furnished it is said that the assessed valuation of this property does not exceed 60 per cent. of its actual cost as above stated. I am of the opinion that the commissioners should have eliminated this item entirely from the assessment which they made. It is well settled that personal property having its actual *situs* outside the state is not subject to the taxing power of the state; and where such property is included among the assets constituting the capital or surplus of a corporation, its value must be deducted in fixing the amount at which such corporation should be assessed for purposes of taxation. People ex rel. Pacific Mail Co. v. Commissioners, 46 How. Pr. 315; People ex rel. Hoyt v. Commissioners, 23 N. Y. 224; People ex rel. Trowbridge v. Commissioners, 4 Hun, 595; affirmed, 62 N. Y. 630; Matter of Swift, 137 N. Y. 77; People ex rel. Edison Co. v. Campbell, 138 id. 543; People ex rel. Sloane v. Barker, 76 Hun, 454. Many other cases may be cited in support of the position which may be regarded as established beyond question that tangible property situated without the state is beyond the reach of its taxing power. In recognition of this principle the commissioners in the case at bar deducted from the gross assets of the relator nearly $4,000,000 under the title of "personal property having a fixed *situs* outside of the state of New York." I fail to see any difference in principle between the cases of tangible personal property without the state and real property in other states. The reason which leads to the exemption from taxation in this jurisdiction of the one applies with precisely the same force to the other. It is true that the act of 1857 does not in terms mention real estate in other jurisdictions among the deductible assets; but neither does it do so with respect to tangible personal property having a foreign *situs* or stock held in foreign corporations, and yet it is settled that neither can be taxed here. Cases above cited. In People ex rel. Pacific Mail Co. v. Commissioners, *supra*, the court in construing chapter 456, Laws of 1857, declares that "all property, whether real or personal, having its location out of this state is not subject to taxation, and is not, therefore, within the

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statute." In the case of Matter of Swift, *supra*, Judge Gray says (p. 84): "The rules of taxation have become pretty well settled, and it is fundamental among them that there shall be jurisdiction over the subject taxed; or, as it has been sometimes expressed, the taxing power of the state is coextensive with its sovereignty. It has not the power to tax directly either lands or tangible personal property situated in another state or country." The cases of People ex rel. Panama R. R. Co. v. Commissioners, 104 N. Y. 240, and People ex rel. Fairfield Chemical Co. v. Coleman, 115 id. 178, are not authorities against the view here taken. In considering these cases it must be observed that in each the method of assessment adopted has been since disapproved by the Court of Appeals. People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433. But aside from this, the discussion in each was addressed to the elimination of the real estate held out of this state, and the measure of value which under the circumstances of the case should be adopted for that purpose. In one case the actual cost of the property was adopted; in the other the assessed value in the foreign jurisdiction was taken. In neither case was the question raised or discussed that the real estate lying in a foreign jurisdiction could not for that reason be taxed here in any form. Without further discussion of cases, I think it clear on reason and authority that real property so situated is exempt from taxation here, and for that reason it should be excluded from the assets of the corporation in assessing its capital. It is deductible as property exempt from taxation, and not under the provisions of the Act of 1857, which requires the deduction of the assessed value of real estate from the capital and surplus, which, I think, must be held to apply only to real property within the state. In this view of the case the commissioners should have deducted from the gross assets the sum of $13,374,753.10, the cost of the relator's real estate situated out of the state, at which sum it is expressly stated to be included in the reported value of such gross assets. Having thus determined the points in dispute, it becomes necessary to consider the resultant effect upon the relator's assessment. This will appear from the following statement: The total gross assets of the relator as shown by its verified statement amount to $47,708,603.73; its total indebtedness, which must be deducted, is $8,063,710.70, leaving a balance of $39,644,893.03. From this should be taken the difference between the actual value of the real estate within the state, but outside of the city of New York, and its book value

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as included in the above total of gross assets, which, as has already been shown, the commissioners should have eliminated, amounting to $3,641,283. The balance is the sum of $36,003,610, which includes the capital of the company, namely, $35,000,000, and a surplus of $1,003,610. By the terms of the Act of 1857, only so much of the surplus as exceeds 10 per cent. of the capital is taxable. As there is no such excess, the whole surplus must be excluded, leaving the capital of $35,000,000 alone as the basis for the computation of the assessment. But the relator is entitled to the following deductions: Assessed value of real estate in the city of New York, $675,000; assessed value of real estate without the city but within the state of New York, $2,559,950; the same (second parcel), $648,006; real estate situated out of the state, included in the estimate of gross assets at its cost, $13,374,753; stocks of other corporations, which were taxed on their capital, held by relator, $14,208,784; tangible personal property having a fixed *situs* outside of the state of New York, $3,870,259, amounting in all to the sum of $35,336,752. As this exceeds the amount of the capital forming the basis of the estimate, it follows that the relator should not have been assessed at all with respect to its capital, and that the action of the commissioners should be reversed and the writ sustained.

Ordered accordingly.

THE PEOPLE EX REL. THE NEW YORK CLEARING HOUSE BUILDING CO., Relator, *v.* EDWARD P. BARKER et al., as Commissioners of Taxes and Assessments of the City of New York, Defendants.*

(Supreme Court, New York Special Term, November, 1897.)

1. **Taxation of the capital stock of corporations — Real estate may be deducted at its full value.**

The law governing the taxation of the capital stock of corporations (Laws of 1857, chap. 456, § 3) requires tax commissioners, first, to value all the property of the corporation, real and personal, or both, and then to deduct the assessed valuation of its real estate in order to ascertain the taxable capital; but the commissioners, in making this deduction, are not limited by the assessed valuation of the real estate and may, if they deem proper, estimate it at its full value.

*Received too late for insertion in proper place.— Rep.

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2. Same — When a building, adapted only to a particular use, may be assessed at cost.

Where the owner did not attempt to establish either a market or an actual value for a building, built for and adapted to a particular use, an estimate of it at its cost was sustained.

3. Same — Review of the action of tax commissioners.

Their action will not be reviewed unless it is capricious, arbitrary or unjust.

CERTIORARI to review assessment upon the property of the relator.

Opdyke, Willcox & Bristow (David Willcox, of counsel), for relator.

Francis M. Scott, counsel to the corporation (James M. Ward, of counsel), for defendants.

BEEKMAN, J. The relator contends that the commissioners of taxes had no right to consider or estimate any other value of its real estate than the assessed value in determining the amount of its capital which was subject to taxation under chapter 456 of the Laws of 1857. By the terms of that statute, "The capital stock of every company, liable to taxation, except such part of it as shall have been excepted in the assessment-roll, or as shall have been exempted by law, together with its surplus profits or reserved funds, exceeding ten per cent. of its capital, after deducting the assessed value of its real estate and all shares of stock in other corporations actually owned by such company, which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value and taxed in the same manner as the other personal and real estate of the county." The learned counsel for the relator has presented a very able and exhaustive brief in support of his contention, but I think the weight of authority in this state is against him. In the case of People ex rel. Equitable Gas Light Co. v. Barker, 144 N. Y. 94, the act above referred to was under construction with respect to the very question which is here raised. In delivering the opinion of the court, Andrews, Ch. J., says (p. 100): "But the law governing the taxation of corporations (Laws 1857, chap. 456) requires the valuation of the whole property owned by the corporation, whether real or personal, or both, in order to ascertain the capital which

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is the subject of taxation (People ex rel. Union Trust Co. v. Coleman, 126 N. Y. 433), and from the aggregate is to be deducted the assessed value of the real estate, and the balance is the capital subject to assessment, after deducting debts and any exemptions allowed by law. In assessing the capital of a corporation for the purpose of taxation, it is immaterial in which description of property the capital may be invested. Both its real and personal property are to be considered and valued, and from the aggregate value is to be deducted the assessed value of the real estate, for the obvious reason that to that extent a separate taxation is provided. People ex rel. Equitable Gas Light Co. v. Barker, 66 Hun, 21; affirmed in this court in 137 N. Y. 544. In case of corporations it may happen that an undervaluation in the assessment of the real estate as such will be corrected in its valuation as part of the capital, and so the undervaluation may be remedied, and the whole property be subjected to taxation at its real value. The fact, therefore, that the assessed value of the relator's real estate was $1,515,400 does not necessarily show that it was its full value, nor did it, we think, preclude the commissioners from estimating its value for the purpose of ascertaining the capital subject to taxation at its actual value, although it exceeded the assessed value. The act of the commissioners in undervaluing the real estate in its assessment as such did not estop the public nor relieve them of the duty, in ascertaining the value of the capital, to estimate the real estate at its full value. We are not here concerned with any question of inequality of assessment as between the relator and other taxpayers. We hold that the commissioners could legally disregard the assessed value of the real estate in estimating the value of the capital, and the question of legality is the only point now in question." I have quoted quite at length from this case, because it seems to render any further discussion upon the point quite unnecessary. What is there said was intended by the court to be an authoritative and final exposition of the meaning of the statute, as is clearly shown by the final sentence, which sums up the discussion. The case is not overruled by People ex rel. M. R. Co. v. Barker, 146 N. Y. 304. The court there objected to the particular manner in which the commissioners attempted to value the real estate, characterizing it as founded upon "presumptions figured upon intricate theories," but the case of People ex rel. Equitable Gas Light Co. v. Barker, *supra*, although twice cited in the opinion,

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is nowhere referred to with disapproval. Finally, the Appellate Division in this department has expressed the same rule as one of the established principles in the assessment of corporations for local taxation. People ex rel. Subway Co. v. Barker, 7 App. Div. 27. In the case at bar the undisputed facts disclosed by the record are that the relator is a domestic corporation having a paid-up capital of $900,000. Its assets consist of a parcel of land on Cedar street and a building which has been erected thereon, which together have cost about $965,000. Its personal assets, consisting of the equipment of the building and cash on hand, amount to $130,049.02. Its indebtedness is $329,050.28, and the assessed value of the real estate is $600,000. Upon this the commissioners have based an assessment of capital for purposes of taxation, amounting to $165,999. This was done by estimating the value of the real estate at its cost, namely, $965,000, and unless in so doing their action has been arbitrary and unjust, the court will not interfere. It has been properly said that the authority which is vested in the court to review their action "does not mean that the court is to place itself in the position of an assessor, and review the decisions of those officers upon questions of value or appraisement where the officers proceeded upon information or evidence tending to support their decision. The court generally will not look into questions of fact as to the amount or value of the personal estate of a corporation or individual. These are questions for the judgment of the assessors and their decisions will ordinarily be sustained." People ex rel. Edison E. I. Co. v. Barker, 139 N. Y. 55, 60. Is there, then, evidence in the record tending to support the decision of the commissioners that the real estate in question was of the value of $965,000? Cost is evidence of value, especially where, as is claimed here by the relator, the property is unique in character, and improved in a way which limits its profitable use to a special and peculiar purpose. The relator does not assume to place a valuation upon the property, nor does it claim that the assessed value is in fact the actual value. While giving the cost in the statement which is submitted to the commissioners, it says that "the building was constructed especially for the business of the New York Clearing House Association, and is not adapted for any other use, so that its market value is not equal to its cost;" but no evidence was presented which indicated what the market value was claimed to be. The affidavit of the president of relator was also submitted, which reiterates this statement, and adds that "in view of the absence of

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any general market value for a building not fitted for other than a single use, the said building has been properly assessed for taxation at not over $600,000." It is claimed by the relator that under the admissions of the return the commissioners were bound to accept the whole of this statement as a limitation of actual value at the sum of $600,000. The return, however, expressly excepts from the admission "the claim and allegation that the market value of the real estate of the relator was not equal to its cost," and asserts that the contrary was true. It will be observed that the statements of the relator upon the subject are largely argumentative in their nature. Because of the nature of the property, it is claimed that the market value of the property is less than the cost, and for the same reason the assertion is made, not that the property is worth only $600,000, but "has been properly assessed for taxation at not over $600,000." Nowhere does the relator undertake to fix the actual value at any specific sum. The question was, therefore, fairly open to determination by the commissioners. They had before them elements tending to support the valuation which they affixed to the property; and assuming the absence of a standard of market value, which the relator asserts was the case, it was within their competency to consider the cost as furnishing a guide to a result. They certainly were not bound to adopt the mere conclusions or opinions of the relator, especially as the basis of valuation upon which it insists would import an impairment of its capital of more than 50 per cent. I do not think, therefore, that the action of the commissioners can be characterized as either capricious, arbitrary or unjust, so as to call for any interference with their action by the court. The case is quite different from that of People ex rel. Subway Co. v. Barker, 7 App. Div. 27. There were circumstances of aggravation there which are without any counterpart in the case at bar, and which make the disposition of that case inapplicable here. It follows from what has been said that the writ must be dismissed, with costs.

Writ dismissed, with costs.

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CHARLES A. BARNES et al., Plaintiffs, *v.* JOHN J. ARNOLD et al., Defendants.

(Supreme Court, Niagara Equity Term, March, 1898.)

Banking Law, imposing an individual liability upon stockholders — Constitutionality — Failure to bring a prior action against the corporation — Assets in the hands of a receiver — Statute not retroactive — Banks not of issue — Status, under the Stock Corporation Law, of different classes of creditors — Depositors, etc.

In an action begun, on March 1, 1895, by creditors to enforce, against stockholders of a state bank, the individual liability imposed by the Banking Law (Laws of 1892, chap. 689, § 52, it appeared that the bank had been changed from a national to a state bank, not of issue, under chapter 409 of the Laws of 1882, that it suspended in October, 1893, went into the hands of a receiver; that actions against it were enjoined, and that it was finally dissolved in December, 1893. It appeared that the receiver had unconverted assets in hand, that it was not likely that they would do more than pay the debts and that a forced sale of the assets would result in a sacrifice.

Held, that the action was maintainable, as the legislature had, under the Constitution of 1846, power to alter bank charters and to impose on the stockholders of all existing banks an individual liability for their debts.

That, as actions against the bank had been restrained, the provisions of the Stock Corporation Law (Laws of 1892, chap. 688, § 55), making an action and the return unsatisfied, of an execution against the corporation, condition precedents, did not apply.

That, as the plaintiffs had obtained leave to sue, the action was maintainable, although the receiver had not converted all the assets into cash, as the plaintiffs had no control over the receiver and as a forced sale was to be avoided, if possible.

That the Banking Law of 1892 had no retroactive effect, and could not impose upon stockholders a personal liability, which did not exist when the debt was contracted.

That, while the legislature could not alter the liability of stockholders of banks of issue, fixed by the Constitution, it might alter the liability of stockholders in all other banks.

It was claimed by the defendants that none of the debts of several classes of creditors were "payable within two years from the time it (the debt) is contracted," within the meaning of section 55 of the Stock Corporation Law.

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Held, that in the case of ordinary depositors, the insolvency of the bank dispensed with presentation, that the present action was a demand and that the deposit became forthwith due and payable, with interest from the time the bank suspended; and that a similar rule was applicable to certificates of deposit.

That drafts, which the bank drew on other banks and sent to customers in payment of borrowed money, and which were protested, became, thereupon debts which the bank owed the customers and were valid claims.

That special deposits were subject to the same rule as to ordinary deposits.

That the defendants were not liable to holders of certificates of deposit issued before the Banking Law went into effect nor to depositors, for deposits made before that date and remaining unpaid.

That, in determining whether deposits, made before the Banking Law went into effect, remain unpaid, the ordinary rule relating to the application of payments should be followed.

ACTION to enforce the statutory liability of the stockholders of a banking corporation.

Millar & Moyer, for Barnes et al.

Charles M. Southworth, for city of Lockport.

Charles Hickey, for Hart et al.

Joshua Gaskell (Richard Crowley, of counsel), for Noble, as administratrix et al.

Ellsworth, Potter & Storrs, for Atwater et al.

John E. & G. W. Pound, for Hall et al.

E. C. Hart, for Stevens et al.

W. H. & F. A. Ransom, for Trevor et al.

Frank M. Loomis, for Tillinghast.

Butler, Mynderse, Joline & Notman, for Notman, as trustee.

Roberts, Becker, Ashley, Messer & Orcutt, for Helmer.

Hubbell & McGuire, for New York Baptist Union.

S. Wallace Dempsey, for Bowen.

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LAUGHLIN, J. The plaintiffs are creditors of the Merchants Bank of Lockport, and bring this action to enforce the statutory liability of the stockholders thereof. On the 12th day of December, 1863, the First National Bank of Lockport was incorporated pursuant to the acts of Congress as a national bank, and on February 24, 1883, its corporate existence was duly extended twenty years by the comptroller of the currency. The latter part of February, 1890, it was duly dissolved for the purpose of becoming a state bank. On the 1st day of March, 1890, the necessary steps required by chapter 409 of the Laws of 1882 having been taken, it was duly converted into a state bank, under the name of Merchants' Bank of Lockport. On that day the state superintendent of banking issued to it a certificate showing due compliance with the law, and authorizing its continuance as a state bank for the period of twenty-five years from that date. On the 6th day of October, 1893, the Merchants' Bank closed its doors, suspended business, and the superintendent of banking took charge thereof. On the 13th day of the same month an action was instituted in this court by the People, through the attorney-general, for the dissolution of the bank, on the ground of its insolvency, and three days later a temporary receiver was appointed, who thereupon qualified and took possession of the property of the bank. At the same time the payment of moneys by the bank was enjoined, as was also the bringing of actions against it. Thereafter such proceedings were duly had in said action, that on the 26th day of December, 1893, final judgment was granted dissolving said corporation, forfeiting its corporate rights, privileges and franchises, directing the distribution of its property among its creditors and perpetually enjoining and restraining the creditors from instituting any action against it, and the receivership was made permanent.

The liabilities of the bank when the receiver took possession, as shown by its books, aggregated $191,789.27. The receiver, under the direction of the court, paid preferred claims, amounting to $20,865.29. He also paid to the general creditors one dividend of 30 per cent. in September, 1894, and another dividend of 10 per cent. in April, 1895. The capital stock of the Merchants' Bank was $100,000. This action was commenced March 1, 1895, at which time, and at the time of the trial and final submission of the case, more than four years after the bank failed, the creditors' claims unpaid exceeded the amount of the capital stock. The receiver has on hand a large amount of unconverted assets, consisting

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of claims in litigation and checks and notes which he has strenuously endeavored to collect, but without success. He has refrained from bringing actions thereon, believing that the expenses would equal or exceed the collections. It is not probable that more than $20,300, which is the receiver's valuation, will be realized on all of such remaining assets. In addition to these, the receiver holds some vacant lands and equities in real estate in different parts of the country. The receiver testifies that the bank's interest therein is not worth to exceed $13,500. At the present time there is no demand or market for such lands or equities. A forced public sale of such remaining assets now would not, in his opinion, be for the best interests of the creditors or stockholders. I think that such a sale would result in a sacrifice of the assets, whereas if such assets are held by the receiver, there is a probability that he will realize his valuation thereon.

The action is brought for the benefit of all other creditors as well as for the plaintiff, and the receiver is made a party defendant.

The statute on which the liability of the stockholders depends is section 52 of the Banking Law, chapter 37, General Laws, being chapter 689 of the Laws of 1892, which provides as follows:

"Except as prescribed in the stock corporation law, the stockholders of every such corporation (referring to banking corporations), shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares."

In Hirshfeld v. Bopp, 145 N. Y. 84, it was held that the only provisions of the Stock Corporation Law, here referred to, are those contained in section 55, chapter 36, General Laws, being chapter 688 of the Laws of 1892, which is as follows:

"No action shall be brought against a stockholder for any debt of the corporation until judgment therefor has been recovered against the corporation, and an execution thereon has been returned unsatisfied in whole or in part, and the amount due on such execution shall be the amount recoverable, with costs against the stockholder. No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due; and no action shall be brought against a stockholder after he shall

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have ceased to be a stockholder, for any debt of the corporation, unless brought within two years from the time he shall have ceased to be a stockholder."

No previous action was brought against the corporation by any of its creditors, and no judgment was obtained or execution issued or returned unsatisfied in whole or in part on any of the existing claims. The stockholders' first contention is, that these requirements of the statute are conditions precedent, and that on account of the omission to comply therewith, this action cannot be maintained. The complaint alleges, and the plaintiffs have proved the insolvency of the bank, the appointment of a receiver and the judgment of dissolution and forfeiture, enjoining the bringing of actions against it, as rendering the statutory conditions precedent impossible of performance, and dispensing therewith. According to the fundamental principles of law and justice, and well-established precedents, these facts excuse and dispense with performance of such statutory conditions precedent. Shellington v. Howland, 53 N. Y. 375; Kincaid v. Dwinelle, 59 id. 548; Hunting v. Blun, 143 id. 511; Hirshfeld v. Bopp, 145 id. 84; Sickles v. Herold, 149 id. 334.

The next point presented by the stockholders is that this action cannot be maintained until the receiver has converted and applied all of the assets. The complaint contains no allegation that after all of the assets are appropriated to the payment of the bank's debts there will remain a deficit equal to the total amount of the capital stock. It is evident from the proofs presented that the deficit will nearly equal the capital stock, but a definite finding to that effect would not be warranted, and is not made. In this respect the question presented is without precedent. There are cases holding that such an action will lie before the assets have been fully converted; but in those cases it was alleged that the ultimate deficiency would be so great that the whole amount for which the stockholders were liable would be required to pay the creditors. Hirshfeld v. Bopp, 81 Hun, 555; 145 N. Y. 84; Hagmayer v. Farley, 23 App. Div. 432.

The first law imposing any individual liability on stockholders in banks was section 7 of article 8 of the Constitution of 1846, which reads as follows:

"The stockholders in every corporation and joint-stock associations for banking purposes, issuing bank notes or any kind of paper

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credits to circulate as money, after the 1st day of January, 1850, shall be individually responsible to the amount of their respective shares of stock in any such corporation or association, for all its debts and liabilities of every kind contracted after said 1st day of January, 1850."

The earliest enactment of the legislature on the subject was chapter 226 of the Laws of 1849, which declared the liability contained in the Constitution, and provided for enforcing the same. In and by its provisions the receiver of an insolvent bank was required to declare a dividend for the benefit of the creditors within ninety days after his appointment. The court was authorized to extend such period ninety days. Within thirty days after declaring such dividend it was the duty of the receiver to report to the court a list of the stockholders, to the end that a reference might be directed to apportion their liability for the remaining debts of the bank, and it was expressly provided that such apportionment should not be delayed by order of the court or otherwise for more than one year. The same provision, in substance, was retained in the revision of the Banking Laws, chapter 409 of the Laws of 1882, all of which was repealed by section 116 of the act of 1892, from which I have quoted. In the revision of 1892, the provision authorizing the receiver to enforce the liability of the stockholders, was not retained. The statutory revision commissioners, who prepared the new Banking Law, had previously recommended to the legislature, in the proposed Receiver's Law, which was not enacted, provisions similar to those therefofore existing. Vol. 1, Report Com'rs Statutory Rev. 1890, pp. 1299 to 1324; and especially p. 1316; Hirshfeld v. Bopp, 145 N. Y. 92.

Under the act of 1849 it was held that the assets of the bank should be deemed the primary fund for the payment of its debts, but that the creditors should not be delayed beyond the period of six months for the purpose of converting the assets, and that proceedings against the stockholders should be instituted at the expiration of that period. The rule adopted was that the receiver should, as far as practicable, realize on the assets by collections and sale, and if there was good reason for postponing the sale of any of the assets beyond six months, the court would make an order accordingly; and that after converting all assets not in litigation, or obtaining an order extending his time so to do, the receiver should proceed against the stockholders for the deficiency then existing. In such cases the stockholders and not the creditors were required

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to look for reimbursement from the unconverted assets. The Reciprocity Bank, 17 How. Pr. 323; 22 N. Y. 9; Matter of Hollister Bank, 23 id. 508.

It does not follow that this rule should be adopted in an action brought by creditors who have no control over the assets or over the receiver. The receiver being an officer of the court, the creditors may fairly assume that he is disposing of the assets with all reasonable dispatch consistent with the rights of the parties interested, and that so far as the assets are at present convertible, they have been converted. After waiting for upwards of four years I think the creditors are not required, before proceeding against the stockholders, to apply to the court for a forced sale of the remaining assets, during a period of great business depression throughout the country. The plaintiffs obtained the consent of the court to bring this action against its receiver, and that was all that could reasonably be required of them. The stockholders who have the greatest interest in the unconverted assets should give this matter their attention, and had they at any time united in requesting the court to direct the receiver to sell such assets at public auction, or otherwise, so that the exact amount of the deficit would be known, I have no doubt such direction would have been promptly given. The stockholders still have ample time for such an application before the hearing on the reference, which will be ordered to apportion their liability, is terminated, or before final judgment after the referee's report. If the stockholders do not apply for such a sale and conversion of the remaining assets, I see no impropriety or injustice in proceeding with the apportionment of their liability, according to the deficit as it now exists, the same as if the court had ordered the postponement of the sale of the remaining assets before the commencement of this action. This objection on the part of the stockholders is purely technical and interposed, not for the purpose of having their liability reduced by a present application of such remaining assets, but for the purpose of entirely defeating this action and postponing their liability indefinitely, if not enabling them to avoid liability under the Statute of Limitations. The payment of the claims of the creditors should not be longer delayed, and the stockholders should be required to pay in and contribute to the present deficit, or the deficit existing at the time of final judgment, so far as they are liable on their respective holdings of stock. The receiver should be directed to return to the stockholders in proportion to the amount paid by them respectively any

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moneys subsequently realized on the undisposed of assets, not required to pay the debts of the bank or the expenses of the receivership. The statute relieves the stockholders of liability unless the action is brought against the corporation within two years from the time the debt becomes due, and also within two years from the time they ceased to be stockholders. While, in this case, the action is not brought against the corporation, yet all claims against the corporation having fallen due upon its becoming insolvent, it would not be an unreasonable construction of the statute to hold that the two-years' statute of limitations applies to such an action as this. The preservation of the rights of the creditors against the stockholders requires that they be permitted to maintain this action before the expiration of two years from the time the bank closed its doors, regardless of the question as to whether the assets have or have not all been converted into cash. It being a suit in equity, the court is clothed with full power to so mould the relief on application for final judgment as to protect the stockholders from being compelled to pay over more money than may be necessary. Peck v. Goodberlett, 109 N. Y. 189; Walton v. Coe, 110 id. 109; Hirshfeld v. Bopp, 145 id. 96.

The stockholders contend that they are not subject to the liability imposed by the Banking Law of 1892. The Merchants' Bank never issued bank notes or any kind of paper credits to circulate as money, and only carried on an ordinary discount and deposit business. At the time it became a state bank there was no law rendering stockholders of such a bank, which did not issue bank notes or any kind of paper credits to circulate as money, liable to the creditors of the bank. There never had been such a law in this state, and was not thereafter until the enactment of section 52 of the Banking Law of 1892, hereinbefore quoted, which took effect on the 17th day of June, 1892. Sections 1 and 2 of the Banking Law expressly provide that it shall be applicable to all moneyed corporations authorized by law to issue bills, notes or other evidences of debt for circulation as money, or to receive deposits of money and commercial paper, and to make loans thereon and to discount bills, notes or other commercial paper; and section 216 thereof in terms repeals all existing banking laws so far as any question here involved is concerned, leaving no other statute by which the affairs of existing banks were to be conducted or could be regulated and supervised. The reasonable construction of the act of 1892, taken as a whole, shows a legislative intent that it should apply to all

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then existing banks, and not alone to those thereafter incorporated. The legislature had authority to repeal all existing bank charters and it had authority to modify and amend existing bank franchises so that the same, if exercised in the future, would be exercised subject to such restrictions as the legislature saw fit to impose for the protection of the public and of the creditors of the corporation. Matter of Lee's Bank of Buffalo, 21 N. Y. 19; Sinking Fund Cases, 99 U. S. 700; Sleeper v. Goodwin, 67 Wis. 577.

The fact that the Merchants' Bank was incorporated by filing a certificate under a general law did not deprive the legislature of its authority to modify or repeal the charter. People v. O'Brien, 111 N. Y. 1.

In the early days, nearly all of the state banks were banks of issue, so that the liability of stockholders to creditors, imposed by the Constitution of 1846 and the act of 1849, extended to almost all state banks. By section 5155 of the United States Revised Statutes, all stockholders in national banks have at all times been liable to the creditors to the extent imposed by section 52 of the Banking Law of 1892, and the latter section was adopted from the former. Later on, when state banks, owing to the discriminating federal tax, ceased to issue circulating notes, their stockholders ceased to be liable to the creditors. This situation was not foreseen when the Constitution of 1846 was adopted, and the law of 1849 was enacted to carry the same into effect. The stockholders elected their officers and agents to represent them in the management of the bank, and they could fully protect their interests by selecting competent, honest men, and requiring their officers to give bonds and by investigating the affairs of the bank from time to time. The depositors had no protection beyond the competency and honesty of those in charge of the bank, and had no opportunity of knowing how the affairs of the bank were managed, except as reported by the banking department, whose examiners were often deceived and misled by the agents and representatives of the stockholders who were conducting the business. The statutory revision commissioners, in 1897, recommended to the legislature that the stockholders in all banking institutions of the state be subjected to the same liability, and that such liability be made the same as under the federal law. If such extended liability of stockholders was only made applicable to new banks, it is evident that the new banks would, on account of the additional security to depositors, command most of the business, and that the old banks would have

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been forced to wind up their affairs at a sacrifice and reincorporate for self-preservation. This course was entirely unnecessary, if it was within the power of the legislature to extend this additional liability to stockholders of existing banks. Upon similar considerations, the court held that the additional liability imposed upon stockholders by the Constitution of 1846 and the act of 1849, applied to all banks previously formed under the general law and under special charters. Matter of Lee's Bank of Buffalo, 21 N. Y. 9; The Reciprocity Bank, 22 id. 9.

Public policy required that greater protection be given to bank depositors as further appears by the amendment adopted in 1894 to section 7 of article 8 of the Constitution, by which it is provided that stockholders of every banking corporation "shall be individually responsible to the amount of their respective share or shares of stock * * * for all its debts and liabilities of every kind."

In the case at bar, I think the intention of the legislature, that the law of 1892 should apply to existing state banks, is clear. The important question presented is, does it, as thus construed, impair the obligation of existing contracts, and thus conflict with the fundamental law of the land? Such a construction should not be given if it would render the law unconstitutional. Long prior to the adoption of the Constitution of 1846, the Revised Statutes contained the following provision; which has remained therein ever since, namely:

"The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal, in the discretion of the legislature."

The first general act for the incorporation of banks, chapter 260, Laws 1838, contained a similar provision. Section 1 of article 8 of the Constitution of 1846, after providing for laws regulating the formation of corporations, contained the following, which has remained in the Constitution to the present day:

"All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

Section 2 of the same article of the Constitution provided and still provides as follows:

"Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law."

In view of this reserve power, to alter, amend or repeal charters of corporations, and of the express constitutional mandate, requiring

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the legislature to enact laws securing the debts due to creditors of corporations, by the individual liability of the stockholders, it was unquestionably within the power of the legislature to increase the liability of stockholders of existing corporations as to debts subsequently contracted. If the stockholders did not wish to incur such increased liability, they should have discontinued operations as a corporation; and, having continued business under the new law, they will be deemed to have accepted and acquiesced in the new liability imposed. If the majority of the stockholders favored continuing business and debts were subsequently contracted against the wishes of the minority, that is one of the conditions and contingencies subject to which they accepted and held their stock. Matter of Lee's Bank, 21 N. Y. 19; Sinking Fund Cases, 99 U. S. 700; Sleeper v. Goodwin, 67 Wis. 577; Attorney-General v. R. R. Cos., 35 id. 429; affirmed, 94 U. S. 164; Meadow Dam Co. v. Gray, 30 Me. 547-551; Weidenger v. Spruance, 101 Ill. 278.

The plaintiffs claim that the stockholders are liable under the Banking Law of 1892 to those who were depositors and holders of certificates of deposit on June 17th, when that law took effect. I think such a construction of the law would render it unconstitutional. The liability of stockholders to the creditors of a corporation is contractual, not penal. Cochran v. Wiechers, 119 N. Y. 399; Corning v. McCullough, 1 id. 47; Flash v. Conn., 109 U. S. 371; Wiles v. Suydam, 64 N. Y. 173.

Those who contract with corporations contract with reference to the liability of stockholders as then prescribed by law. Such liability becomes part of the contract with the creditors. After the liability has accrued the legislature cannot release the stockholders therefrom. Close v. Noye, 4 Misc. Rep. 616; 58 N. Y. St. Repr. 115.

The corporation is the principal debtor and the stockholders' individual liability is that of a surety. Such statutes should be construed strictly in favor of the stockholder. Chase v. Lord, 77 N. Y. 1; Gray v. Coffin, 9 Cush. 199.

It has been seen that the stockholders were not liable to the creditors of the bank prior to the 17th day of June, 1892. Those who were depositors and holders of certificates of deposit prior to that day did not become such on the faith and credit of the stockholders. The policy of the state has been to encourage the formation of corporations. Stock in corporations would be of very uncertain value and an unsafe investment if it should be held that

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the legislature may at any time enact laws rendering the stockholders liable for the debts of the corporation where no such liability existed when the debts were contracted. There is, therefore, no reason or propriety in applying to the Banking Law of 1892, which imposes a personal liability upon the stockholders, a retroactive effect, which, if not rendering it unconstitutional, would make its validity exceedingly doubtful. The well-established rule of construction in such cases should be followed, giving the language of the act prospective operation only. Matter of Lee's Bank, 21 N. Y. 20; Hirshfeld v. Kursheedt, 81 Hun, 560; Statutory Construction Law, chap. 677, § 31, Laws 1892; Wheeler v. Fontier Bank, 23 Me. 310; Commonwealth v. Cochituate Bank, 3 Allen, 42; Ireland v. Palestine, etc., Turnpike Co., 19 Ohio, 372-373; People v. O'Brien, 111 N. Y. 60; Weidenger v. Spruance, 101 Ill. 378.

There is no force in the contention of counsel for the stockholders that the legislature could in no case impose an individual liability upon stockholders of any banks excepting those upon which such liability was imposed in the Constitution. The Constitution having prescribed the personal liability of stockholders in banks of issue, the legislature could not enlarge or diminish such liability; but the legislature was free to extend such liability to other banks.

With one exception, all of these stockholders became such prior to June 17, 1892, when the Banking Law took effect, and it is urged that such law would be unconstitutional for that reason, if applied to them. In Hirshfeld v. Bopp, 145 N. Y. 97, 98, the complaint did not allege whether the debts in question were incurred before or after the enactment of the Banking Law, and I do not understand that the Court of Appeals considered the question of the application of that law to debts previously contracted; but the court did consider the question as to whether stockholders, who acquired their stock before the enactment of the Banking Law, would be liable the same as stockholders who acquired their stock subsequent thereto, and held, in effect, that the liability of both was the same.

The remaining questions submitted in this case relate to the liability of the stockholders to the different classes of creditors of the bank, it being claimed by the defendants that none of the debts were payable within two years from the time they were con-

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tracted, within the intent and meaning of section 55 of the Stock Corporation Law already quoted.

The principal creditors are the ordinary depositors, who deposit and check out from day to day as the necessity of their business requires. Such deposits do not draw interest and they do not become due or payable to the depositors until presentation of a check and demand. The insolvency of the bank dispenses with such presentation and demand, the bringing of this action constitutes a sufficient demand, and the deposits became forthwith due and payable with interest from the time the bank suspended payment. Sickles v. Herold, 149 N. Y. 334; Payne v. Gardiner, 29 id. 146; Bank of Republic v. Millard, 10 Wall. 152; Van Alstyne v. National Commercial Bank, 4 Abb. Ct. App. Dec. 449.

Such deposits are due within two years within the meaning of this statute. Hagmayer v. Farley, 23 App. Div. 432.

Another class of creditors are those who hold certificates of deposit payable on return of the certificates and demand. Such demands accrue at the time the certificates are issued, but do not fall due or become payable until returned and actual demand is made thereon. They are negotiable instruments and the Statute of Limitations does not commence to run against them until presentation and demand. They were not presented and payment was not demanded before the failure of the bank, and consequently they had not become due or payable. The failure of the bank dispensed with presentation and the bringing of this action constituted a sufficient demand, and I think the stockholders are liable to the holders thereof. Payne v. Gardiner, 29 N. Y. 146; Howell v. Adams, 68 id. 314; Pardee v. Fish, 60 id. 265; Smiley v. Fry, 100 id. 262.

The Merchants' Bank, shortly before it failed, drew drafts on other banks and sent the same to customers in payment of borrowed money, and some of these drafts were dishonored and protested. The Merchants' Bank became liable to the customers to whom it was indebted for borrowed money forthwith upon these drafts being protested, which was within two years from the time the debts were contracted. These were lawful business transactions, as banks have power to borrow money and to provide for repaying the same in any ordinary manner, and the stockholders are liable to such creditors. Curtis v. Leavitt, 15 N. Y. 9, 222-225.

Another class of creditors deposited money in a special account in this bank on an express agreement that they were to receive in-

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terest thereon, or on the balances remaining on deposit from time to time. There was no agreement that the money was to remain on deposit for any particular time and the depositors were at liberty to check against the same at any time. In such cases the debts thereby created were not due until demand, and they are governed by the same law as is applicable to the other ordinary deposit accounts.

Counsel for the plaintiffs has presented one of each class of claims that have been presented against the bank, for the purpose of having the stockholders' liability therefor determined, and of having the important legal questions settled before the case is sent to a referee.

An interlocutory judgment is granted, determining who the stockholders are, who are liable to creditors and the amounts of stock held by them respectively, and adjudging their liability, to the classes of creditors as herein considered and decided, and appointing a referee to take proof and determine who are the creditors to whom the stockholders are liable, and the amounts of their respective claims remaining unpaid, and apportioning the deficit among the stockholders to the extent of their liability. Matter of Empire City Bank, 18 N. Y. 199. It follows from what has been stated that the stockholders are not liable to the holders of certificates of deposit where such certificates were issued before June 17, 1892, nor are they liable to depositors for deposits made prior to that date and still remaining unpaid. In determining whether deposits made prior to June 17, 1892, still remain unpaid, the ordinary rule of the application of payments to the earliest items of indebtedness will be followed by the referee, so that any amounts drawn from the bank by the depositors on or after June 17, 1892, shall be applied in reduction of the depositor's balance at the close of business on June 16, 1892. I deem this the equitable and proper rule, inasmuch as it appears that no change was made in the books of the bank at the time of enactment of the new law, but that the accounts continued the same as before. Had the old accounts been closed and new accounts opened, probably this rule would not be applicable. Morse on Banks & Banking (3d ed.), § 255 and cases cited.

The liability of each stockholder is limited to the amount of stock held by him at the par value thereof, and interest thereon from the date of the commencement of this action against him. The depositors and other creditors whose claims were due on de-

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mand are entitled to interest on their respective claims from the 6th day of October, 1893, the time when the bank became insolvent, closed its doors and suspended payment, but not as against the stockholders in excess of their total liability. Wheeler v. Miller, 90 N. Y. 362, and cases cited; Chemical Nat. Bk. v. Bailey, 12 Blatchf. (U. S. D. C.) 480; Morse on Banks and Banking, Vol. 2, § 150; Sickles v. Herold, 149 N. Y. 335.

I have now decided all of the points of law presented in this case and have sufficiently, I think, stated the rules of law to enable the referee to easily discharge the duties devolving upon him.

Ordered accordingly.

Matter of the Judicial Settlement of the Accounts of THE FIDELITY LOAN, TRUST & GUARANTY COMPANY and HENRY C. MCCORMICK, as Executors, etc., of JOHN SATTERFIELD, Deceased.

(Surrogate's Court, Erie County, March, 1898.)

1. **Executors — Payments for necessary repairs of a railroad, in part belonging to their estate — Salary of a vice-president.**

Payments made by executors for the necessary repairs of a railroad, which their testator and another person controlled and practically owned, should be allowed them, upon their accounting, as well as their payments to an officer of one of the executors, a trust company, for his services as vice-president of the railroad company, and this, although he voluntarily transferred his compensation to the trust company, as it is proper that the executors should, under the circumstances, be represented in the management and control of the corporation.

2. **Same — Sale of stock which subsequently rose in value.**

As executors are bound by statute to proceed with diligence to pay the debts of the deceased, they are not chargeable because, in order to pay large debts of their testator, they, from time to time, during a period of fourteen months, necessarily sold dividend-paying stock of an oil company, which, subsequently and unexpectedly doubled in value.

3. **Same — Liability upon a doubtful venture, not determined upon an intermediate accounting.**

Upon an intermediate accounting, the court will not determine the question whether executors were justified in expending moneys of

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their testator upon an irrigation scheme, undertaken by their testator in a foreign state, the result of which, as a venture, is still undetermined.

OBJECTIONS filed to the accounts of executors.

Rogers, Locke & Milburne, for executors.

Norris Morey, for Matilda M. Satterfield, etc., contestant.

MARCUS, S. Objections have been filed to the accounts presented by the executors, which for convenience may be divided into four groups, as follows:

First. Items of expenditures relating to the Williamsport & North Branch Railroad.

Second. Salary of vice-president of such road.

Third. Sale of the Standard Oil Trust stock, and Natural Gas Trust stock.

Fourth. Items of expenditure relating to the Boise City & Nampa Irrigation Land & Lumber Company.

The objections relating to the expenditures of the executors on account of the railroad property must be dismissed for want of testimony. There is no evidence from which a conclusion can be reached that the executors, who practically represent the management of the road, should be refused credit for payments and expenses made by them which are charged to be extravagant and unwarranted.

Nor does the testimony show them to have been lacking in care and diligence in the management of the railroad affairs. The fact that the net earnings have steadily decreased is satisfactorily explained. The bark and timber in the country through which the railroad runs, and where tanneries formerly flourished have become to a great extent exhausted, and it would appear that a large amount of the business in previous years was drawn from such sources. The road was built to act as a connecting line between two great branches; in which purpose it seems to have failed by reason of a change in the management of the roads with which the connections were expected to be made. The road, as at present constructed, runs from Hall, Pennsylvania, to Satterfield, Pennsylvania, a distance of forty-eight miles, and was built in the lifetime of the testator, and has in no way been extended by the ex-

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ecutors. The testimony shows that only such repairs were made as were absolutely needful.

A more serious objection has been urged against the payment of $5,000 per year (one-half of which has been borne by this estate) to Mr. McCormick as president and afterwards to Mr. Forman, as vice-president of the same road, upon the theory that the executors thereby reap a personal advantage from their position by so dealing with the trust property. It is admitted that the payments of salary have been actually turned over by Mr. Forman to the Fidelity Company, one of the trustees, under the will of this estate.

My first impression was with the contestants, since it would appear as if a larger commission were ultimately thereby received by the executors than the law directs or allows, but, from a careful consideration of the question, the legal effects of the acts complained of do not seem to be in any way discordant with the law of trusts.

At the time of Mr. Satterfield's death, he and Mr. Hascal L. Taylor owned nearly all the stocks and bonds of the Williamsport & North Branch Railroad. A few bonds were outstanding in the names of other parties. Prior to his death a system of management had been inaugurated, including a president, a superintendent and a treasurer or auditor. The salary of the president was fixed at $5,000. Mr. McCormick continued, as president, in receipt of this salary until he entered upon the duties of the office of attorney-general of the state of Pennsylvania, which was in the early part of 1895. When Mr. McCormick resigned as president, Mr. Forman was elected vice-president, and the management of the road was put into his hands. He could not be elected president, because, under the laws of the state of Pennsylvania, the president of a railroad operating exclusively within that State, must be a resident thereof. After his election, it was arranged by correspondence between the directors that he should have the same salary as his predecessor. Since his election he has been the executive head of the company, and has managed its affairs and was, therefore, an officer of the road. The board of directors was elected annually by the stockholders, appearing either in person or by proxy. The stock of the Satterfield and Taylor estates was voted by proxy.

The rule that the law does not permit a trustee to assume relations inconsistent with his trust does not seem to have any application to these facts.

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The recent case of Elias v. Schweyer, 13 App. Div. 336, seems effectively to sustain the claim of the executors. An action was brought for the removal of the trustee of an estate. A portion of the trust estate consisted of a majority of the stock of a brewery company. One of the trustees manipulated the voting power of that stock so as to elect himself a director and president of the company, with a large salary attached thereto. The court said: "Most of the criticisms made upon the defendant relate to his conduct as president of the brewery corporation; and if this were justified, then the remedy to apply would be to exclude him from the directorship and presidency of the corporation. We do not mean to infer that the facts proven will justify such a judgment; because it was seemingly the duty of the trustees of the estate stock to be represented in the board of directors, and no valid ground is assigned why one of the trustees should not be at the head of the affairs of the company. It is questionable, however, whether a trustee, if so elected as president, should receive any salary; because it appears that the discretion is vested in the trustees to sell the stock, should an advantageous opportunity occur; and one who is in receipt of a large salary might be unconsciously biased in his judgment when the question was presented between his own interest in retaining such salary and the interests of his *cestui que* trust, which might be promoted by a sale of the brewery. As it was not shown that the receipt of such salary in the past has in any way affected an advantageous disposition of the brewery, any future injury to be apprehended from this cause could be obviated by adjudging that, if elected president, he should receive no salary as such." The court clearly stated (page 341) that it did not determine this point about salary, leaving it for determination on the new trial as an open question to be decided in accordance with testimony to be then produced.

There is no evidence that Mr. Forman's salary as vice-president "has in any way affected an advantageous disposition," of the railroad property. The case is authority for the position that, even if Mr. Forman had been the executor of this estate, it would have been proper for him to have been a director and president. It would, therefore, seem that the election of Mr. Forman as vice-president of the railroad company was entirely proper, indeed, prudent. There was no duty incumbent on the executors to run the railroad, because, among the assets of the testator, were many bonds of that road. Their duty was complete by simply holding the

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stocks and bonds, voting thereon and receiving any interests or dividends that might be paid. There was no obligation on the executors to manage the affairs of the railroad because the estate was a large holder of stocks and bonds. The management of its affairs was entirely different and separate from any duties the Fidelity Company and Mr. McCormick were called upon to perform as executors and trustees. Mr. Forman, having rendered his services as vice-president, and having been paid a salary which was fixed by Messrs. Taylor and Satterfield in their lifetime — and it seems to have been a fixed amount since the inception of the road — there is no warrant for depriving him of that compensation, or the Fidelity Company to which he turned over the salary, it not being shown that the receipt of the salary has affected the sale of the road or of its stock. It is also to be noted that Mr. Forman is not the executor of this estate, but only an officer of the executor — the Fidelity Company — which is a corporation, and, in contemplation of law, an entirely distinct person from its officers or stockholders.

The fact that Mr. Forman turned his salary over to the Fidelity Company in no way changes the status of affairs since that was purely voluntary on his part. The trust company had no legal claim to it, nor was Mr. Forman under any obligation so to dispose of it. Nor does the fact that it was so paid affect his legal claim to the salary as between himself and the railroad company or as between him and the stockholders of the company. The salary was payable out of the funds of the railroad company, and was a charge to be deducted before the net income was ascertained, and to that net income, only, is this estate entitled as bondholder and stockholder. It was an obligation of the railroad company and not of this estate. The duties performed by Mr. Forman not being in any sense the duties of the executors, the salary so earned by him cannot be deemed extra compensation. Again, the Fidelity Company alone is not even the sole executor, since Mr. McCormick, though perhaps not particularly active, is nevertheless executor and trustee on an equal footing, and his action is as necessary in all matters as that of the Fidelity Company.

It has been urged that the case is the same as though the trustee were an individual instead of a corporation; that since the Fidelity Company received all sums which nominally were paid to Mr. Forman in his official capacity as vice-president, and which have gone to swell its assets and increase the value of its stock, the

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reasons which would affect the action, or bias the judgment, of an individual would have the same effect on the board of directors. If there was any evil in such a condition, the remedy is the same for an individual as a corporation, but the evil does not seem to exist. It must be apparent that the executors should have representation in the management of this road, and since it was possible to obtain control of this corporation as to its direction, it needs no argument to prove the wisdom and sense of such a course, rather than to have allowed its guidance to be in the hands of strangers to the welfare of this estate.

The sale by the executors and trustees of the stock of the Standard Oil Trust and the Natural Gas Trust, it is contended, was made unnecessarily and improvidently, was in violation of the plain duty of the executors and trustees under the will and the law, and ought not to be approved or justified. It has been urged that, if this estate had been administered carefully, diligently and providently by some competent person who had acquainted himself with its affairs and with the purpose of the will, for the benefit of the widow and the children, the debts would now be all, or nearly all paid, and those stocks would now be in the hands of the executors, producing a handsome income for the legatees.

It has been further urged that the chief end of the will, to-wit, the forming of three income-producing funds from the securities owned by the testator for the three legatees, appears not only to have been lost sight of, but to have been made almost impossible, in that it has been substantially defeated by reason of the sale of the stocks mentioned.

In brief, the position taken by the contestants is that the stocks mentioned should never have been sold, since they were large interest-paying stocks, but rather other assets in the hands of the executors should have been converted.

The sale of the Standard Oil stock, although when sold bringing the highest market price that had been reached up to the dates of sales, which was at all times under 200, coupled with the fact that it has since reached 400 and upwards, is the cause of much irritation to the contestants.

As the entire estate subject to the payment of debts in the course of administration was to be held for the benefit of the legatees to be converted into money, as the interests of the estate required (article 7, Will), and as all securities held by the testator were set aside by the will and the executors released from liability for their

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depreciation (article 8, Will), it is contended that the executors would have been justified, and, by the strongest implication, were required to hold for the legatees these extraordinary securities which were paying 2½ to 3 per cent. per quarter, which had never paid less and whose success and credit were at their highest point.

When Mr. Satterfield died in April, of 1894, he owed $384,-045.91, consisting of notes payable, $200,000; indorsement on notes, $8,498; accounts, $909; mortgages, $53,613.43; balance of the subscription to the Pecos Company, $65,025. With the notes there were pledged, as collateral, 750 shares of the Standard Oil Trust stock; 371 shares of the Natural Gas Trust stock, and other securities.

The evidence shows that as to the larger portion of these notes, the executors were notified that they must be paid. The inventory shows that the only available securities of any account on hand for the payment of debts were the Niagara Falls & Suspension Bridge Railway Company bonds, $39,500; the Third National Bank stock, $38,520; The North Western & Ohio Natural Gas stock, $34,110; The Fidelity Trust & Guaranty Company stock, $54,600; The Natural Gas Trust stock, $42,665, and the Standard Oil Trust stock in question.

As there was collateral up for the notes, and payment was insisted on, they had to be paid, and the executors were entirely warranted in selling the available securities of the estate to provide the means of paying them as they fell due. Any obligations they gave after that, in renewal of them, would be only personal obligations, as executors cannot bind the estate by new contracts. There was no duty resting upon them to keep on pledging the securities of the estate and keep the indebtedness of the estate running at 6 per cent.

The direction of the statute is that the executor should "proceed with diligence to pay the debts of the deceased." No exception whatsoever could have been taken to the conduct of the executors if they had sold the available securities of the estate, including the Standard Oil Trust stock at the time the notes fell due to provide the means for paying them, as payment was necessary, in view of the right of the creditor to realize on the securities pledged for their payment. For the relief and advantage of the estate, that more time might be had in which to realize favorably on the securities, the executors took up the notes, as they matured, with the funds of the Fidelity Company and held them as liabilities of

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the estate, to be actually retired, as available securities of the estate should be sold.

The primary duty of the executor is to get in the estate and pay the debts. That is, to convert the available securities to an extent necessary to pay the debts; to allow the debts to run at 6 per cent. while there were available securities which could be sold and the proceeds used to pay the debts, would expose the executors to liability for loss arising from such an operation.

The executors were not bound to make the advances to take up the notes as they matured. They, however, during the year 1894 advanced to the estate the sum of $223,142.92.

They could not let this indebtedness run along indefinitely. The duty was to pay it; to convert the available assets into money with which to pay the indebtedness.

What securities should be converted was purely an executorial duty, and called for the "intelligent and honest action of the executors," and, unless it is shown that such action was not in good faith, it cannot be criticised.

The contestants strenuously urge that since the Fidelity Company had already made the advancements to assist and relieve this estate, they should have continued without selling the stocks in question to repay themselves and to have waited a more opportune time for the final disposition of the stocks in question. As subsequent events have shown, such a course would have been of enormous benefit to the estate. But the question now before us is whether these executors, by reason of their failure so to do, can be held for maladministration. Manifestly, they cannot.

To have carried along this large indebtedness, drawing six per cent. interest, when there were available securities which could be applied, after conversion, to its payment, would, I believe, justly have subjected them to liability and a charge of maladministration.

Again, if the stocks in question had depreciated instead of so marvelously appreciating, it is doubtful whether the question would have been raised at all. It does not seem to me that there was any other way in which to pay the debts of the testator excepting by the sale of marketable securities, and the designation of such securities for sale was a matter for the executors to determine, "acting honestly and in good faith, and with reasonable prudence and discretion."

While extra dividends in 1896 and 1897 raised the price of this stock, there was no way in which they could be expected or foreseen.

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Where an executor, in due course of administration and in the exercise of reasonable care, sold certain railroad stock which had depreciated in his hands, it was held that he was not liable to the estate for the loss sustained, although the market value of the stock afterwards increased. Matter of Green, 37 N. J. Eq. 254.

If these executors and trustees had received money from the estate which, under the will, it would have been their duty to invest, and they had purchased the stock in question, they certainly would have been personally liable had there ultimately been a loss upon the transaction. Ackerman v. Emott, 4 Barb. 626.

It does not seem to me that the executors and trustees need depend on the speculative character of this stock as a justification of their course or as a matter of wisdom, since, apart from their legal right to sell the same for payment of debts of the estate, the will contained no directions what should be done with the stock, nor any provision forbidding its sale. Hence, they had a right, acting in good faith, to sell the same and reinvest the proceeds in securities authorized by law.

"The rule in England and in this state which forbids a trustee to invest funds in the securities of railroads and other corporations is a most salutary one; and we think the rule is, or ought to be, that a trustee who receives trust property, invested in securities, should, if he is not *required* to sell the same, at any rate, have the right to make such sale and invest the proceeds in the same manner that he would be required to do if trust property received by him were money." Toronto Gen. Trust Co. v. C., B. & Q. R. R. Co., 64 Hun, 1; affirmed, 138 N. Y. 657.

But I prefer to dispose of this branch of the case by resting upon the proposition, that it is the duty of executors to convert the personal assets of an estate into money for the payment of debts.

The condition of estates sometimes strongly commends the advancement of money where debts, perhaps bearing heavy interest, are to be paid and the immediate reduction of the real or personal property into ready cash, to meet such payments, might be attended with serious loss, yet I have been unable to discover any authority making such advancements a duty incumbent upon executors.

The advances, made by the Fidelity Company to this estate from May 21, 1894, to September 19, 1894, amounted in all to the sum of $223,142.92. Subsequently there was advanced on and after January 23, 1895, $35,000, making a total of $258,142. The

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repayment of those advances began on the 14th day of January, 1894, the last payment being on April 22, 1897.

The times of the sales of the Standard Oil Trust stock began November 10, 1894, the last sale being made on the 14th day of January, 1896.

It would, therefore, seem that there was no haste, but rather ample deliberation in the sale of the stock and likewise in the payment of the indebtedness.

The objections to the expenditures relating to the Boise City & Nampa Irrigation Land & Lumber Company present to my mind the weighty and troublesome question of this contest. Serious, because of the large amount involved; embarrassing, by reason of the legal question arising.

Mr. Satterfield, in his lifetime, in conjunction with Mr. Taylor, became involved in this Idaho Canal and Land matter. On February 15, 1894, the canal was sold at the instance of Taylor and Satterfield, on execution, and was bought in by them. It consisted of a main irrigation canal, with various lateral canals. Prior to that time they had acquired several thousand acres of land in the vicinity of the canal. They had bought 6,000 acres and had under contract 6,000 acres more, on which they had paid two dollars per acre. The only testimony of what Mr. Satterfield's original investment was, is given by Mr. Forman, from the books of Mr. Satterfield, at the sum of $74,047. Doubtless Mr. Taylor's investment was the same, but there is no testimony to that effect.

When Messrs. Taylor and Satterfield acquired control of the canal, a Mr. Greene, who had been connected with them in other business enterprises, was placed in charge, and he has been continued in office by the executors at an annual salary of $3,500. He is the manager of the company, and the man upon whom the executors have entirely relied.

The inventory in this court shows the appraisal of the Boise City property at $15,012. The appraisal of the same property in the Probate Court at Boise City was taken at about $435,000 — $371,000 for the canal and the balance for the land. It is hard to reconcile these valuations on the same property.

Mr. Foreman testified that there has been paid out, on account of the Boise City matters, $60,325.36.

At a public sale made of this property, for the purpose of defeating a second mortgage and perfecting the title, the canal property was recently sold on a foreclosure for $13,000, and was bid in by Mr. Greene for the benefit of this estate and Mr. Taylor.

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The total expenditures from March, 1894, to August 5, 1897, were $184,170, and the total income from the canal for the same period was $81,789. The difference was supplied by the executors of this estate. These expenditures, according to the contention of the contestants, were all for enlargements and improvements in widening and enlarging gates, including their supports and foundations, deepening the canal, constructing new ditches, building warehouses and telephone lines; while, according to the accountants' theory, they were solely for the purpose of preserving the property and were strictly in the line of repairs to maintain it in proper condition, that it might be kept adapted to the purposes for which it existed.

It is urged by the contestants that the executors were not justified in sending $60,000 and upwards to Idaho for the purpose of protecting property appraised in the inventory at $15,000, especially in view of the fact that, since the $60,000 has been expended, the canal has been sold at a public sale for $13,000; that the expenditure was an *investment* pure and simple; that, in this alleged squandering of money, they have violated the fundamental duty of the trust; that which they were set to preserve, they have put at hazard, with all the chances against them; and that which they were bound to use either in paying debts or creating a fund bringing income to the legatees, they have sent beyond their own reach and the reach of this court, where it cannot be recalled or applied to either purpose.

The executors answer that they could not permit the portion of the estate to go to waste for the lack of necessary repairs and that they did only what was essential to the preservation of the trust property; that they were bound to preserve the property in such condition that it should be kept adapted to the purposes for which it existed; that the condition of the property warranted and justified any expenditure made thereon, and, with the improvement of the times, that there will be a sale of it which will make a handsome return to the estate, and justify everything that has been done by them.

Many other arguments have been presented, and reasons assigned on behalf of both parties why this account should and should not be allowed.

I have concluded to dispose of this branch of the case without determining, at this time, the merits of the questions presented.

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The canal venture is still an open one so far as this estate is concerned.

The accounting before me is only an intermediate one and only shows the receipts and disbursements with reference to the canal property up to a given time. It is, therefore, impossible now to determine the final state of the canal account when it shall be closed by a sale. The executors may feel justified in expending still further money upon its maintenance, and the amount, to be eventually realized, may make it entirely unnecessary to pass upon the alleged abuse of discretion.

All the figures, involved in this heavy transaction, from its beginning to its close should be before the court in making a final disposition, especially where the administration of this estate will in any event have to run for many years, making an immediate disposition of matters, growing out of a continuing enterprise, unimportant.

I am free to say that, with the sworn apparaisment made for these executors by disinterested appraisers of $15,012 in mind and the obviously speculative character of this venture from the outset, it may be doubtful whether an expenditure by the executors of $60,000 and upwards — over four times the estimated value of the canal — for its preservation, was justified.

If this transaction were now fully closed upon the basis of the figures presented, it would be a question, deserving of careful consideration, whether the court ought to relieve the executors from liability for, what now appears to have been, the exercise of poor judgment; their good faith not being assailed.

It may be that the outcome of this venture will place the matter in a more favorable light to the executors and it would seem fairer to all parties concerned to postpone the final disposition of this portion of the accounting until the canal account is closed.

The executors may, therefore, be allowed credit at this time upon all items connected with the canal property, the same to be allowed, nevertheless, without prejudice to reopening their consideration in future accountings.

Decreed accordingly.

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Matter of the Judicial Settlement of the Accounts of HORACE G. YOUNG, as Trustee under the Will of THOMAS CORNELL, Deceased.

(Surrogate's Court, Ulster County, March, 1898.)

Apportionment, under Code of Civil Procedure, section 2720, of the income of a trust, accruing during a part of a year.

Rule for apportioning, under section 2720 of the Code of Civil Procedure, upon the death of the widow of a testator, the income of an estate, for a part of a year, under a will which directs that, during "two lives," his widow shall receive 90 per cent. of the corpus and his estate 10 per cent.; and that, after her death, his two daughters shall each receive 45 per cent. of the income during "two lives." Apportionment of taxes paid for the whole year.

JUDICIAL settlement of the accounts of a trustee.

H. C. Soop, for executor and trustee.

A. T. Clearwater, for Mary Augusta Coykendall and others, and Samuel D. Coykendall, as general and special guardian of Robert B. Coykendall and Frank Coykendall, infants.

Cardozo Brothers, for Nellie L. Carpenter and Catharine Ann Cornell; also, for Nellie L. Carpenter, as executrix, etc.

BETTS, S. On February 23, 1897, the trustee herein filed his verified petition asking for a judicial settlement of his accounts, and upon the same day a verified account was filed in this court, bringing the account as such trustee down to February 1, 1897.

Objections to various items of the account were filed on behalf of Catharine Ann Cornell, who at that time was entitled to 90 per cent. of the net income of said estate. Hearings were had, and adjournments taken, until May 15, 1897, when the said Catharine Ann Cornell died in this county, leaving a last will and testament which was subsequently admitted to probate, and appointing Nellie L. Carpenter, her daughter, as the executrix thereof. Mrs. Carpenter duly qualified, and letters testamentary were issued to her, and she came in and was made a party to these proceedings as such executrix. On June 1, 1897, a supplemental, verified account of the trustee, showing the receipts and disbursements of the estate,

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up to and including the 15th day of May, 1897, was filed in this court. Objections to that account were filed by Nellie L. Carpenter, both individually and as executrix of the will of Catharine Ann Cornell, deceased. Various large payments of income being due the estate in July and August, a second supplemental account was filed by the trustee on the 1st day of September, 1897, which brought the accounts from and including the 16th of May, 1897, down to and including the 31st day of August, 1897. To this supplemental account, various objections were also filed by Mrs. Carpenter, individually, and as such executrix.

Hearings have been had from time to time, and adjustments and corrections of the various items in these accounts have been made by the trustee, so that now there are only two principal items of objections for me to pass upon, the others having, from time to time, by suggestion of the court, or agreement of counsel and trustee, been disposed of, with the exception of various objections in which this court has been asked to change its former rulings and which are hereinafter more fully referred to.

The will of Thomas Cornell, so far as is necessary to be quoted for a proper disposition of the questions at issue here, after devising the estate to trustees therein named, during the continuance of two lives in being, provides as follows:

"4th. To pay over unto my said beloved wife Catharine Ann for her own sole use, benefit and disposition, during the period of said 'two lives' if she shall live so long, or if not, during her natural life, ninety (90%) per cent. of the net income of my said estate in lieu of dower or of any rights she may have in any or to any part of my estate except as herein provided, the remaining ten (10%) per cent. to revert to my estate.

"5th. If my said wife should not survive said 'two lives,' but should die before either or the last of said 'two lives,' then at her death, to pay over unto my two daughters Mary Augusta and Nellie L. to each one-half of the income heretofore directed to be paid to my said wife, to-wit: forty-five (45%) per cent. of the net income of my said estate, to each of my said daughters, share and share alike, during the period, or the remainder of the period, of said 'two lives.'"

The principal item in dispute between Mrs. Carpenter as executrix of Catharine Ann Cornell and the remaindermen and Mrs. Coykendall is as to what part, if any, of the income of the estate up to May 15, 1897, the date of Mrs. Cornell's death, earned,

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but not due nor collected by the trustee at that time, should be paid to Mrs. Carpenter as executrix of Catharine Ann Cornell's will.

This contention must now be settled by the provisions of section 2720 of the Code of Civil Procedure. That section is as follows:

"All rents reserved on any lease made after June 7, 1875, and all annuities, dividends, and other payments of every description made payable or becoming due at fixed periods under any instrument executed after such date, or, being a last will and testament that takes effect after such date, shall be apportioned so that on the death of any person interested in such rents, annuities, dividends or other such payments, or in the estate or fund from, or in respect to which the same issues or is derived, or on the determination by any other means of the interest of any such person, he, or his executors, administrators or assigns shall be entitled to a proportion of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of such person or of the determination of his or her interest, after making allowance and deductions on account of charges on such rents, annuities, dividends, and other payments. Every such person or his executors, administrators or assigns, shall have the same remedies at law and in equity for recovering such apportioned parts of such rents, annuities, dividends and other payments, when the entire amount of which such apportioned parts form part, become due and payable and not before, as he or they would have had for recovering and obtaining such entire rents, annuities, dividends and other payments, if entitled thereto; but the persons liable to pay rents reserved by any lease or demise, or the real property comprised therein shall not be resorted to, for such apportioned parts, but the entire rents of which such apportioned parts form part, must be collected and recovered by the person or persons who, but for this section, or chapter 542 of the Laws of 1875, would have been entitled to the entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this section. This section shall not apply to any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description."

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It is contended by Mrs. Carpenter, as executrix, that all income except dividends on stock owned by the estate, earned, but not due nor collected prior to and including May 15, 1897, should be paid to her by the trustee without any deductions therefrom. It is, on the other hand, contended by Mrs. Coykendall and her children, that the sum due the estate of Mrs. Cornell, if any, could only be ascertained at the close of the fiscal year, and that the portion of income earned, but not collected, should bear its just proportion of the expenses of the estate.

It was shown upon the hearing, that the last payment of interest to the trustee which included any part of the interest earned prior to the death of Mrs. Cornell, was due and payable March 1, 1898, and the one prior to that was due and payable February 20, 1898. I am informed that the entire amount of payments in which Mrs. Cornell's estate could be interested have been collected by the trustee.

We have seen that the statute provides that "Every such person or his executors, administrators or assigns shall have the same remedies at law and in equity for recovering such apportioned parts of such rents, annuities, dividends and other payments, when the entire amount of which such apportioned parts form part, become due and payable and not before, as he or they would have had * * * if entitled thereto." That time would seem now to have arrived, since the last payment in which Mrs. Cornell's estate is interested, has been made. No good purpose could be served by requiring the executrix of Mrs. Cornell's estate to wait any greater period, and it is in every way desirable that the trustee should understand the proper method to make up his accounts, and to whom the income from said estate should be payable.

The ordinary expenses of the estate, for repairs, clerk hire, etc., are about the same amount from month to month. It so happens, however, that since the death of Mrs. Cornell, the taxes for an entire year have been paid upon the estate. It may be that some trifling amount for school taxes will have to be paid before May 15, 1898, but that is unlikely, and if so, the amount would be trivial.

It would be manifestly improper in making an adjustment between the conflicting rights of the estate of Mrs. Cornell, and Mrs. Carpenter and Mrs. Coykendall, the present life tenants, to place the entire amount of those taxes as part of the expenses of the ten months, when they were in reality for the protection of

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the estate during an entire year. Indeed, the point is made by Mrs. Carpenter as the executrix, that the portion to which her mother's estate is entitled should not bear any part of the taxes. This cannot be maintained. Had Mrs. Cornell lived, the income earned by the estate would first have paid all the expenses of the estate including all taxes, and 90 per cent. of the remainder would have been paid her under the provisions of the will. No reason has been shown for any greater exemption to her estate than she would have received if living. The taxes paid by the estate are so adjusted for past expenses and anticipated payments, that any adjustment is difficult. Probably the principal fixed items are for interest on county and municipal indebtedness, which had been running from March 1, 1897, to the date of Mrs. Cornell's death, and have of course been accumulating ever since. The amount due Mrs. Carpenter as executrix of Mrs. Cornell's will, should at least bear its proportion, with the other income of the estate. Taxes must be paid, and property receiving the benefit therefrom, must bear its due proportion.

Since the entire amount of income in which Mrs. Cornell's estate is interested, has now been received by the trustee, it is proper that he should file his account so that the parties interested and the court, may know the present condition of the account, and be able to make an intelligent division of the income. The trustee may file a supplemental account to and including the 15th day of March, 1898. That makes ten-twelfths of a year from May 15, 1897, the date of Mrs. Cornell's death. An equitable division may then be had of the income between the executrix of Mrs. Cornell's will, and Mrs. Carpenter and Mrs. Coykendall, the present life tenants, as follows:

From the gross income from May 15, 1897, to March 15, 1898, ten months, deduct all expenses properly chargeable to income except the taxes. As we have shown that the taxes for the entire year have been paid, ten-twelfths of the total amount of taxes paid upon the entire estate may also be deducted. The remainder, after deducting all said expenses, trustee's commissions, and ten-twelfths of the taxes from the gross income, will be the net income for those ten months. Ten per cent. of that net income should be set aside to revert to the estate of Thomas Cornell. Then compute the amount of income (not including any dividends on stocks owned by the estate) which was earned, but not collected by the trustee on May 15, 1897, less 10 per cent. thereof. Deduct from

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that such proportion for the expenses of the estate for the ten months less two-twelfths of taxes paid, as this income bears to the remaining income for the ten months, less 10 per cent. thereof, and the remainder thus found will be the income due Mrs. Cornell's estate, and shall be at once paid to Nellie L. Carpenter, executrix of Catharine Ann Cornell's will, in full for her interest in the estate of Thomas Cornell. Such part of the remainder of the income after deducting two-twelfths of the taxes as the trustee may deem prudent shall be equally divided between Mrs. Coykendall and Mrs. Carpenter.

There seems to be no reported case construing section 2720 of the Code of Civil Procedure in which the facts are similar to the one at bar. I have given the subject careful examination, and the conclusions here arrived at are in accordance with the plain reading of the section. Some of its provisions are opposed to the principles of the common law. 2 Perry on Trusts, § 556; Clapp v. Astor, 2 Edwards Ch., 379; Kearney v. Cruikshank, 117 N. Y. 95. It seems framed to fully meet a case similar to the one before me. Its provisions are clear, and I have construed it accordingly.

Some of the income of this estate is also apportionable under the provisions of the common law, aside from section 2720, such as interest on bonds and mortgages, and other securities. U. S. Trust Co. v. Tobias, 21 Abb. N. C. 393.

Various objections have been made to this account, which were fully passed upon by me at the last hearing in this estate, and reported in 17 Misc. Rep. 680, and subsequently affirmed by the Appellate Division, 15 App. Div. 285; 44 N. Y. Supp. 585, with the exception of extra compensation to the trustee, which was reversed by a divided court.

I see no reason for changing my former ruling. Both sides have appealed to the Court of Appeals, and the matter is there for determination. Evidence has been introduced showing the situation more in detail than was done on a former hearing, but no new facts have been adduced, nor new reasons given for any different determination by this court.

I adhere to my former decision, and a decree may be entered as to those disputed questions, in accordance therewith.

An objection is also made on behalf of Mrs. Carpenter that more than 10 per cent. of the net income of the estate has been passed to the credit of the principal estate by the trustee. That claim does

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not seem to be well founded. Computations of an expert are submitted to sustain this contention, but as not unfrequently happens, the expert bases his estimates on incorrect data, which of course makes his results differ from the trustee's, and from the truth. The expert accountant apparently bases his contention on paragraph VI, of the decree of September 8, 1896, in this estate, which is as follows:

"The testator in the fourth subdivision of his will having directed that 10 per cent. of the net income of his estate should revert to the principal estate, it is further ordered, adjudged and decreed, that 10 per cent. of the net income of the estate from the 30th day of June, 1894, is the sum of $4,500, and that that sum revert to and become the property of the principal estate." But paragraph VI should be read in connection with paragraph XII, which is as follows:

"It is further ordered, adjudged and decreed: That out of the said moneys so belonging to the income account of the said estate, the said trustee do pay to the principal estate, and credit to the principal estate account, the said sum of $4,500, the 10 per cent. of the net income of the said estate from the 30th day of June, 1894, as stated in the sixth subdivision or paragraph of this decree, and that he do further pay to and credit the said principal estate account with the further sum of 10 per cent. of the net income of the said estate, from the time to which 10 per cent. of the net income of said estate amounted to the said sum of $4,500; such last-mentioned payment to be made by the said trustee in the due administration of the said estate." The facts are, that during the time covered by that decree $45,000 had been paid to Mrs. Cornell, and as the will directs that 90 per cent. of the income shall be paid her, and the remaining 10 per cent. revert to the estate, it was provided by that decree, that the trustee should pay $4,500 to the principal estate, and as some expenses charged to income by the trustee were directed to be charged to the principal estate by the court, it left some additional income to be paid to the widow Mrs. Cornell, and to revert to the principal estate. This was evidently what the last part of paragraph XII of the decree was intended to cover in addition to equalizing the payment of $45,000 to Mrs. Cornell. However, $45,000 is 90 per cent. of $50,000, and 10 per cent. thereof is $5,000. Mrs. Cornell has had $45,000, but only $4,500 has been credited to principal estate, so instead of the trustee paying to the principal estate too much, he should really pay $500 more

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to comply with the provisions of paragraph XII of that decree and with the will of Thomas Cornell.

My attention may be called to some part of the accounts now before me where this has been done, but I have failed to find it, and my understanding of the latter part of paragraph XII was that the trustee under its provisions was to pay sufficient to the principal estate to equalize the 90 per cent. paid to Mrs. Cornell. The trustee in his account will, therefore, credit the principal estate with $500 from the income account.

It may easily be that some objection not satisfactorily settled or withdrawn has been overlooked by me; if so, upon my attention being called to it, I will pass on it at once.

A decree may be handed up in accordance with this memorandum.

Decreed accordingly.

Matter of the Appraisal of the Property of JOHN BERRY, Deceased, Under the Act in Relation to Taxable Transfers of Property.*

(Surrogate's Court, Westchester County, December, 1897.)

Transfer tax— Payment of mortgages from personalty under the directions of a will.

A direction to executors, that they shall pay mortgages upon the real estate devised by the will of their testator, does not authorize an appraiser, appointed under the Transfer Tax Law, to deduct the amount thus paid from the value of the personal property in order to determine the value of the succession to it; and this, notwithstanding the fact that the Real Property Law (Laws of 1896, chap. 547, § 215) expressly permits a testator to direct that mortgages upon his realty shall be paid from his personalty.

APPEAL from a decree of the surrogate assessing transfer tax.

Joseph W. Middlebrook, for state comptroller, appellant.

Charles H. Ostrander, for executors, respondent.

SILKMAN, S. This is an appeal on behalf of the state from a decree assessing the transfer tax upon the succession to the property of John Berry, deceased.

*Received too late for insertion in proper place.— [Rep.

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From the will of John Berry it appears that he died possessed of a considerable amount of personal property, and also of an equity of redemption in numerous pieces of real property.

By the second clause of the will, he devised to his sister, Elizabeth O'Neill, the premises 34, 36 and 38 South Fourth avenue, Mount Vernon, together with a lot on South Fifth avenue, which premises were incumbered by a mortgage for $21,000.

By the third clause of his will, he devised to his niece, Rebecca Berry, the premises 31 South Fifth avenue, Mount Vernon, which premises were incumbered by a mortgage for $3,000.

By the fourth clause of his will, he devised to his niece, Mary Ann Berry, the premises 33 South Fifth avenue, Mount Vernon, which premises were incumbered by a mortgage for $2,000.

By the eighth clause of his will he devised to Elizabeth Havey, a stranger, the premises 16 Glen avenue, Chester Hill, Mount Vernon, which premises were incumbered by a mortgage for $5,000.

The ninth clause of his will contains the following provision: "I direct my executors hereinafter named and appointed, to pay all taxes and assessments and water rates confirmed and owing at the date of my death upon the real estate hereinbefore devised, and also to pay and discharge all mortgages covering the said real estate hereinbefore devised."

The appraiser, in arriving at the value of the succession to the personal property of which the testator died possessed, has deducted therefrom the amount of the mortgages upon the real estate.

It is claimed, on behalf of the state, that in this respect the appraiser erred and that the decree entered upon his report should be reversed or modified.

In arriving at the value of the succession to the personal property, it is necessary for the appraiser to deduct the amount of debts owing by the testator at the time of his death, together with the expenses of the administration. Matter of Westurn, 152 N. Y. 93.

Under the rule existing prior to the Revised Statutes, the mortgage indebtedness of a testator would have been payable out of his personal property, and the devisees would have taken the real estate discharged of the mortgages. But this rule was changed by the provision in the Revised Statutes which has been incorporated in the Real Property Law, section 215: "Where real property, subject to a mortgage executed by any ancestor or testator,

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descend to an heir or passes to a devisee, such heir or devisee must satisfy and discharge the mortgage out of his own property, without resorting to the executor or administrator of his ancestor or testator, unless there be an express direction in the will of such testator, that such mortgage be otherwise paid."

On behalf of the executors it is claimed that as the testator has directed the mortgages to be paid out of the personalty, the real estate passes freed from the mortgages, as they would have under the common-law rule, and that the amount of such mortgages must be deducted from the value of the personal property, in measuring the value of the succession to it.

The question to be decided is not entirely free from doubt. The Transfer Tax Law is silent upon the point involved. Provision is made for the fixing of " the fair market value at the time of the transfer thereof of property of persons whose estates are subject to the payment of any tax imposed by this article," and, to arrive at the fair market value of personal property, it has been held that it is necessary to deduct the amount of the decedent's debts. In the Matter of Westurn, cited above.

As the precise question before us has not been determined in any reported case, so far as I have been able to find, the intention of the legislature must be sought by the application of recognized rules of construction and by the decision in analogous cases.

The argument is not without force that the Transfer Tax Law was passed with full knowledge of the provisions of the Revised Statutes above cited, and which permitted, in express terms, a direction by a testator for the payment of mortgages out of his personal estate, and that the Transfer Tax Law must be read in connection with such provision of the Revised Statutes. Nevertheless, I am of the contrary opinion. There does not seem to be any necessity for reading the two statutes together; while, on the other hand, such construction should be given to the Transfer Tax Law as would make its application uniform and equitable, " and such construction should be put upon it as does not suffer it to be eluded." People v. Utica Ins. Co., 15 Johns. 357.

The succession to real estate passing to near relatives is not subject to any tax, while the succession to personalty is taxable at the rate of 1 per cent.

It will readily be seen that if the construction, contended for by the executors, were to be adopted, a great temptation would exist to elude the payment of taxes, by the creation of mortgages

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perhaps in favor of intended legatees, and then directing their payment out of personalty.

The Tax Law, as has been determined, has to do with facts which are not to be disturbed by the application of equitable rules or legal fictions. Matter of Sutton, 3 App. Div. 208; 149 N. Y. 618.

The testator here died possessed of a certain amount of personal property and the equity of redemption in real property.

The direction to pay mortgages upon the real property in which he owned an equity of redemption was nothing more nor less than an equitable conversion of a certain amount of personal property into real property.

It is true that the direction to pay the mortgages out of the personalty is in no sense a legacy, but tax laws are not to be governed or construed by the same rules that apply to the construction of wills, and for that reason I do not feel bound by the decision in Matter of Hopkins, 57 Hun, 9.

From the view that I have taken of this case, it becomes necessary for me to modify the decree entered upon the report of the appraiser, in so far as it takes, from the personal property, the amount of the mortgages upon real estate, in fixing the fair market value of the personal property.

Let a decree be entered in accordance with the views expressed, with the costs to the appellant.

Decree modified, with costs to appellant.

THE HOUGH CASH RECORDER CO., Appellant, *v.* JOHN S. MOWRY, Respondent.

(County Court, Oneida County, March, 1898.)

Action on a written order — Proof that the order did not contain a stipulation which the vendor's agent stated was in the order.

Where the agent of a vendor states, at the time of the execution by the vendee of a written order for a cash recorder, that the order contains a stipulation that the recorder shall be sent upon trial and may be returned if it proves unsatisfactory, the vendee is entitled, in an action brought upon the order, to show that such was the agreement and that it has been omitted, as he has a right to rely upon the statement of the agent.

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APPEAL from a judgment in favor of defendant entered upon a verdict of a jury by S. E. Spinning, a justice of the peace of the city of Rome, on the 30th day of September, 1897.

Action upon a written contract of sale.

Timothy Curtin, for appellant.

H. C. Wiggins, for respondent.

DUNMORE, J. At and prior to the time the contract in writing was signed by the defendant, he and plaintiff's agent Page had a conversation about the terms of the contract. The defendant testified that it was agreed that a cash recorder should be sent him on trial and if it did not work to his satisfaction he could return it and need not pay for it. The defendant further testified that thereupon Page made out what he called an order and said it was as they had agreed, and thereupon the defendant signed it. Upon trying the machine, the defendant testified that it did not work to his satisfaction and he returned it.

The foregoing testimony, if credited by the jury, entitled the defendant to a verdict. It presented a question of fact and the finding of the jury is conclusive upon this court. Defendant had a right to rely upon the statement of Page that the paper signed contained the agreement as made. Mead v. Bunn, 32 N. Y. 275 (279); Smith v. Countryman, 30 id. 655.

In Mead v. Bunn, at page 280, the Court of Appeals announced the rule as follows: "Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party, and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate and verify statements, to the truth of which, the other party to the contract, with full means of knowledge, has deliberately pledged his faith."

The defendant having signed the contract on the representation that it contained the terms of the oral agreement, the written contract would not be binding upon him and, in an action upon it, he is not precluded from showing by parol what the actual terms of the contract were.

The appellant's counsel relies upon the case of Wheeler v. Mowers, 16 Misc. Rep. 143, to sustain the doctrine that where a party

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has full opportunity to read a contract before he executes it, he is not relieved from liability thereon because he omitted to read it, or read it carelessly and failed to notice some of its provisions. In that case the contract was executed in duplicate and each party took and retained a copy. The plaintiff put a hot water-heating apparatus into the defendant's house and expended several hundred dollars in so doing. The defendant testified that he put his copy of the contract in his desk and omitted to read some of its provisions until he was called upon to pay, when he discovered that the agreement as orally made had not been embodied in the written contract. This court held, and I think correctly, that under those circumstances the defendant was liable. That a defendant who, having a copy of the contract in his possession, permitted the other party to perform at a considerable expense, would not be permitted to escape liability because he had omitted to read and learn the term of his contract. The case at bar is not a parallel case.

I think the answer was broad enough to justify the reception of the evidence.

The judgment must, therefore, be affirmed, with costs.

Judgment affirmed, with costs.

MILO DANIELS, Plaintiff, *v.* JOHN C. SOUTHARD et al., Defendants.

(County Court, Rensselaer County, March, 1898.)

County Court — Power, on a motion, to cancel for illegality a justice's judgment docketed in the County Court — Failure to serve the summons.

Where there is a preponderance of proof by affidavit that the summons was never served on one of the defendants in an action brought in a Justice's Court, the County Court has power, after the judgment has been docketed as one of that court, to direct, upon a mere motion, that it be canceled as against the defendant in question; as the judgment is sufficiently a County Court judgment to permit that court, under the provisions of section 348 of the Code of Civil Procedure, to relieve the defendant from its illegality.

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MOTION to cancel of record a statutory judgment of the County Court based on the filing of a transcript of a judgment rendered in the Justice's Court.

Samuel Foster, for plaintiff.

C. C. Van Deusen, for defendant Irene F. Southard.

NASON, J. This is a motion to cancel of record a statutory judgment of the County Court, based on the filing of the transcript of a judgment in an action brought by the above-named plaintiff against the above-named defendants, rendered in the Justice's Court of the town of Nassau, for the sum of $35.36, and to restrain the plaintiff from taking any proceeding on said judgment, or upon any execution issued thereon, and for other and further incidental relief.

When the motion came to be heard, the plaintiff's counsel raised the preliminary objection that the court had not jurisdiction to hear the same. The court overruled the objection and plaintiff excepted.

The affidavits of three persons, the defendants in this action, and one George N. Southard, who seems to be an entirely disinterested party, were presented to the court to show that the defendant Irene F. Southard was never served with the summons in the suit at the time and place stated in the return of the constable, and these affidavits are not contradicted except so far as the bare return of the constable may have that effect. If the court has a right to consider the above affidavits on the hearing of a motion of this sort, the conclusion is almost irresistible that Mrs. Southard was never served with any process in the case.

The only question to be determined is whether the County Court has power to grant the relief asked for or whether the defendant must be relegated to her remedy by appeal from the judgment.

Section 3044 of the Code of Civil Procedure provides that "the only mode of reviewing a judgment, rendered by a justice of the peace, is by appeal."

The counsel for the plaintiff contends that this motion contemplates a review of the judgment, and that, as the County Court can only acquire jurisdiction of the subject-matter of the case in the manner prescribed by law, it is precluded from granting this application. I do not doubt but that the defendant might

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appeal, and that the principle and practice applicable to appeals founded on error of fact would govern such a proceeding. Code Civ. Proc., § 3057. It would also appear that if no appeal were taken, or no transcript filed, the County Court would be powerless to take any action in the matter. But here is a case where the filing of the transcript is, by express law and judicial authority, declared to constitute the justice's judgment, the judgment of the County Court for certain purposes, and yet the contention of the plaintiff's counsel is that the County Court is powerless to exercise any control over such a judgment and over the execution issued thereon, or to restrain or prevent any abuse of its own process, even though the defendant to the action had never been served with the summons or had her day in court.

If such facts as are alleged by the defendants here exist, it would seem a great hardship and injustice were it incumbent on the defendant to stand mutely by and see her property levied upon and sold under an execution before her appeal could be determined, or even to compel her to procure a stay by filing the statutory undertaking on appeal, if the issuing of an execution on the transcript can be prevented in that way.

If, to defeat a proceeding founded on a transcript, having the antecedents of the transcript filed in the case, it is proper to show that no summons was ever served on the defendants in the original action, and by proof of such a fact virtually nullify the County Court judgment on which the execution is based, then of course it would be within the jurisdiction of the court to grant exactly the relief asked for on this motion.

If the justice's judgment may be shown to be void as to this defendant when it has been indirectly asserted, after the filing of the transcript, as in the present case, then this motion does not seek a review of a justice's judgment, but simply seeks to prevent an abuse of the process of the County Court and, therefore, does not come under the ban of section 3044 of the Code of Civil Procedure, because there is no judgment in fact to be reviewed.

A careful examination of the authorities has convinced me that in the present proceeding, at any rate, the illegality of the judgment may be shown by the defendant as a ground for relief.

The plaintiff contends that the judgment of the justice was valid, citing N. Y. & E. R. R. Co. v. Purdy, 18 Barb. 574, where it was said, "and if the constable's return shows such a service, the jurisdiction of the justice is established, and his judgment

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will be regular on its face." Some of the doctrine in that case, however, seems to be in conflict with other well-recognized authorities.

"Though a return of personal service makes out, *prima facie*, a case of jurisdiction over the person of the defendant, yet, if the summons were not in fact served, no jurisdiction could have been in fact acquired. I do not see upon what principle jurisdiction can be obtained over a person who has had no notice, either actual or constructive, of the proceeding. He can be no more bound by a false return than by a forged return. It would be an intolerable hardship to confine a defendant to a remedy for a false return, against an irresponsible constable, and not to allow him to hold the judgment void." Fitch v. Devlin, 15 Barb. 48.

"It is necessary that faith be given to official action; that for the purpose of conferring jurisdiction on courts or officers, certificates of officers should be *prima facie* sufficient; and that all persons other than the party for whose benefit the proceeding is instituted, should be protected by such certificates. But as against the party himself it should be competent to show that such certificates are false or fraudulent; that courts should have power to control the action of their officers, so as to promote justice, not defeat it." Waring v. McKinley, 62 Barb. 622.

The Justice's Court had no jurisdiction over the defendant except so far as the return of the constable gave the justice *quasi* jurisdiction so as to secure him immunity for what might otherwise be deemed wrongful acts, and the illegality of the judgment may be asserted as against the plaintiff to the original action when he seeks to enforce it by issuing an execution and levying it on defendant's property.

Aside from the difficulty arising from the peculiar rules applicable to Justice Court practice, the right of parties affected to attack a judgment for lack of jurisdiction either in the same action or in some cases collaterally is too well recognized to require discussion. See Ferguson v. Crawford, 70 N. Y. 254; Dutton v. Smith, 10 App. Div. 566.

The present motion is made in the same action in which the judgment was rendered, although its enforcement is sought in a different court. The justice's judgment has become a statutory judgment of the County Court, while at the same time it contains some of its original characteristics. Dieffenbach v. Roche, 112 N. Y. 621.

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The filing of the transcript of the original judgment, enlarges the sphere of its enforcement, and as far as its collection is concerned places it on the same footing as the judgments rendered in the County Court.

Courts of general jurisdiction have inherent authority to control and regulate their own process and records within proper limits, and by section 348 of the Code of Civil Procedure it is provided that "Where a County Court has jurisdiction of an action or a special proceeding, it possesses the same jurisdiction, power and authority in and over the same, and in the course of the proceedings therein, which the Supreme Court possesses in a like case; and it may render any judgment, or grant either party any relief, which the Supreme Court might render or grant in a like case, and may enforce its mandates in like manner as the Supreme Court."

A state of facts very similar in some respects to these at present brought before me in this proceeding was brought to the attention of the court in the case of Martin v. Mayor, 12 Abb. Pr. 243; affg. 20 How. 86; 11 Abb. Pr. 295. It was there held that where a transcript of a judgment recovered in the Marine or Justice's Court has been filed in the county clerk's office, on the application of the comptroller to open the judgment for fraud and collusion, the proper course is to enjoin the plaintiff from proceeding without prejudice to his right to use the judgment in the court of record.

It will be noticed that this decision was rendered before section 348 of the Code of Civil Procedure had enlarged the powers of the County Court, and enabled it to apply certain equitable remedies in the exercise of its jurisdiction.

Let the defendant take an order in the usual form that the transcript herein and the docket of judgment entered therein be canceled of record by the clerk of Rensselaer county as against the defendant Irene F. Southard, and enjoining and restraining the plaintiff, his agents, servants and attorneys, from any proceeding upon said transcript of judgment or issuing any execution thereon as against said defendant, or to collecting the same out of her property without prejudice to the right of the plaintiff to sue on the justice's judgment, and with $10 costs of this motion to defendant Irene F. Southard.

Ordered accordingly.

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SIMON ROTH, Respondent, *v.* EVA PHILLIPS, Appellant.

(City Court of New York, General Term, March, 1898.)

Discontinuance of an action — Consideration.

An answer, interposed to an action for goods sold, which alleges that, subsequent to its commencement, the plaintiff agreed to discontinue it upon the defendant's promise to pay the debt in weekly installments and, until it was paid, to purchase from the plaintiff alone all goods required in the defendant's business and which the plaintiff sold, presents, when accompanied by allegations of the defendant's willingness to perform and the plaintiff's refusal, a perfect defense to the action.

APPEAL from a judgment in favor of plaintiff by direction of the court.

Max D. Steuer, for appellant.

Hastings & Gleason, for respondent.

FITZSIMONS, Ch. J. The complaint alleged the sale and delivery of goods to the debtor, the answer admitted such sale and delivery and as a defense alleged that, subsequent to the commencement of the action, the plaintiff and the defendant entered into an agreement whereby the defendant agreed to pay the debt in question in installments of $25 each week, commencing on the 23d day of November, 1897, and also agreed to purchase from the plaintiff all goods needed by her in her business which were sold by him and from no other person until said debt was fully paid. That, in consideration of such covenants on the defendant's part, the plaintiff agreed to discontinue this action and settle the same. The answer further alleged that the defendant fully performed said contract on her part and that the plaintiff failed and refused to perform said contract on his part. The trial justice upon the plaintiff's motion directed a verdict in the plaintiff's favor upon the ground that the answer presented no defense, and in so doing we think he committed error. That part of the answer which alleged "that it was agreed by the defendant that, if the plaintiff would discontinue and settle this action that defendant

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would purchase goods from plaintiff and would trade with him and buy whatever she required in her line, and that defendant did in pursuance of such agreement purchase goods from plaintiff and was ready and willing to further purchase goods and that said action was thereby settled and should have been discontinued," presented in our judgment a legal defense, which, if established, would have entitled the defendant to a dismissal of the complaint.

Judgment reversed and a new trial ordered, with costs to appellant to abide the event.

OLCOTT, J., concurs.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

THE BRADLEY & CURRIER CO., LIMITED, Respondent, *v.* ARTHUR B. HARRISON et al., Appellants.

(City Court of New York, General Term, March, 1898.)

Order to examine adverse party — Void, unless witness' fees are paid — Vacation.

The service, in an action, of an order for the examination, under section 873 of the Code of Civil Procedure, of a defendant as an adverse party, when not accompanied by the payment of legal fees, is a nullity and entitles the defendant to move, upon the return day of the order, for its vacation.

APPEAL from an order for the examination of defendant as an adverse party.

Otis & Pressinger, for appellants.

Donald McLean, for respondent.

FITZSIMONS, Ch. J. The plaintiff procured an order for the examination of the defendant Harrison as an adverse party under section 873 of the Code of Civil Procedure.

The order was served upon him, but no fees were paid him. Upon the return day of said order he appeared by attorney making the preliminary objection, that "Harrison had not been paid or tendered the fees prescribed by section 874 of the Code," which

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objection was overruled by the Special Term justice and an order was made requiring him to submit to an examination.

The order appealed from must be reversed. Unless waived by Harrison, it was the duty of the plaintiff to have paid him, upon the service of the order for his examination, the fees required to be paid in such instances prescribed in section 874; their failure to do so rendered the service of said order void and entitled him, upon its return day, to move for its vacation for that reason; the refusal to grant his motion to that effect, we think, was error and entitled him to a reversal of the order appealed from and also to a dismissal of the order for his examination. In view of this ruling it is not necessary to consider the questions presented by the appellants' counsel.

Order appealed from reversed, with costs.

O'Dwyer, J., concurs.

Order reversed, with costs.

The Lawyers' Surety Company of New York, Respondent, v. Max Reinach, Appellant.

(City Court of New York, General Term, March, 1898.)

Conversion — Overpayment by an administratrix upon shares of next of kin — Right of action in her assignee — What are assets — Estoppel — Nature of the action.

In an action for a conversion brought by the assignee of an administratrix, it appeared that the defendant was an assignee of the shares of two of the next of kin of the intestate, under assignments, one of which was prior and the other subsequent to a surrogate's decree, made in the matters of the estate. The defendant assignee was a party to this decree and it fixed the amounts of the shares. Subsequently to both assignments, a second decree, to which the defendant assignee was also a party, was made, which, in legal effect, declared that the value of the shares had been overestimated and that the defendant assignee had been overpaid by the administratrix for the shares, to an amount stated. The defendant, among other things, alleged that he had purchased the shares, in reliance upon the statements of the administratrix and of the next of kin that the shares were of the value fixed by the original decree; and, further, that the admin-

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istratrix had not as such, nor as an individual, brought any action at law to recover the overpayments of the next of kin.

Held, that the cause of action was assignable and that the plaintiff assignee had a right to enforce all the rights of the administratrix. That the recovery sought was assets of the estate, paid by a mistake, and that the administratrix might have sued for such a claim, either in her representative capacity or as an individual.

That, to such an action, it was no defense that the representations of the administratrix as to the value of the shares were false, as she had no power to estop the estate of her intestate.

That the action was not upon contract, as the payment made by the administratrix to the defendant was not voluntary, but was compelled by, and might have been enforced under, the decree.

APPEAL by the defendant from a judgment entered upon a verdict directed in favor of the plaintiff.

Edward W. S. Johnston, for appellant.

Marshall S. Marden, for respondent.

O'DWYER, J. The complaint alleges that on or about the 25th day of November, 1896, in a certain proceeding in the Surrogate's Court of the county of Kings, entitled "In the matter of the judicial settlement of the account of Ann Murphy, as administratrix of the goods, chattels, and credits of Patrick Murphy, deceased," a decree was duly made and entered, judicially settling the accounts of Ann Murphy as such administratrix, and ordering, adjudging and decreeing that she pay sums amounting to seven hundred and fifty-three dollars and forty cents ($753.40) to Max Reinach, as assignee of the shares or interests of Edward Murphy and Elizabeth Aaron, son and daughter respectively of Patrick Murphy, the said deceased, as and for the shares to which they were entitled as the only next of kin of said Patrick Murphy, deceased. That defendant was a party to said accounting, and had due notice of the steps taken therein, and the entering of the aforesaid decree.

That thereafter, and on or about November 25, 1896, said Ann Murphy, pursuant to the aforesaid decree, paid the aforesaid sums amounting to seven hundred and fifty-three dollars and forty cents ($753.40) to the said Max Reinach, as assignee of the shares or interests of the said Edward Murphy and Elizabeth Aaron.

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That thereafter, and on or about the 5th day of January, 1897, the decree so entered on the 25th day of November, 1896, was duly reopened by the said surrogate of Kings county. That the defendant was a party to the application to open said decree, and had due notice thereof, and was represented by counsel on all proceedings thereon and the entry of said order. That thereafter, and on or about the 15th day of April, 1897, in the Surrogate's Court of the county of Kings in the said proceedings entitled "In the matter of the judicial settlement of the account of Ann Murphy, as administratrix of the goods, chattels and credits of Patrick Murphy, deceased," a new decree was duly made and entered, modifying and amending the said decree of November 25, 1896, by striking therefrom and vacating the order, judgment and decree therein contained that Ann Murphy pay to Max Reinach, as assignee of Edward Murphy and Elizabeth Aaron, sums amounting to seven hundred and fifty-three dollars and forty cents ($753.40), and substituting in place thereof, that the said administratrix, Ann Murphy, pay to said Max Reinach, as such assignee of Edward Murphy and Elizabeth Aaron, the shares to which they would be entitled, amounting only to the sum of three hundred and fifty dollars and fourteen cents ($350.14). That said defendant was a party to the application for said new decree of April 15, 1897, and had due notice thereof, and was duly represented by counsel thereon, and on the making and entry of the decree. That the amount of seven hundred and fifty-three dollars and forty cents ($753.40) paid by said Ann Murphy to Max Reinach, as alleged in paragraph IV, was four hundred and thirteen dollars and twenty-five cents ($413.25) in excess of the amount to which he was entitled, as determined by said decree of April 15, 1897, and that said defendant was overpaid the said sum of four hundred and thirteen dollars and twenty-five cents ($413.25), which he held to the use of the said Ann Murphy, as administratrix, as aforesaid. That thereafter, and on or about the 24th day of April, 1897, the said Ann Murphy, as administratrix as aforesaid, by an assignment in writing, duly executed under seal, duly assigned, transferred and set over unto this plaintiff all her right, title and interest in and to all rights which she had or possessed under said decrees and each of them against this defendant for the recovery of the money so overpaid to him and all claim and all demand of every nature which she had against the said defendant by reason of such overpayment. That payment of the said sum of $413.25

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was duly demanded of the defendant by the plaintiff on the 8th day of May, 1897. That said defendant has failed, neglected and refused to pay the said sum, and that the whole amount is still due and owing to this plaintiff.

None of these allegations are denied, except that appellant denies he was overpaid and that he holds the money so overpaid to the use of said administratrix or otherwise, and that there is anything owing.

The answer then sets up for a further, separate and distinct defense to the complaint "that prior to the 25th day of November, 1896, Edward Murphy and Elizabeth Aaron requested this defendant to purchase from them their interest in the estate of Patrick Murphy, deceased, and stated and represented to this defendant as an inducement to purchase the same, that they, the said Edward Murphy and Elizabeth Aaron, were the only heirs-at-law and next of kin of the said decedent, Patrick Murphy. That thereupon and before this defendant purchased such shares or interests, he, this defendant, inquired of Ann Murphy, whether the aforesaid statements and representations were true and correct, and that the said Ann Murphy then and there stated and represented to this defendant, in order to induce this defendant to purchase such shares, that the said Edward Murphy and Elizabeth Aaron were the only heirs-at-law and next of kin of the said decedent, Patrick Murphy. That this defendant, believing such representations and statements so made to be true, and being induced thereby and relying thereupon, did, in good faith and without any knowledge of the falsity of such alleged statements and representations, purchase from the said Edward Murphy and Elizabeth Aaron their interest in such estate, believing at the time that Edward Murphy and Elizabeth Aaron were the only heirs-at-law and next of kin of the said Patrick Murphy, deceased. Upon information and belief, that such statements were false and untrue, and that the said Edward Murphy, Elizabeth Aaron and Ann Murphy knew or should have known, and each of them knew or should have known, that such statements and representations were false and untrue when made as aforesaid. That this defendant received all moneys named in the complaint as assignee of the said Edward Murphy and Elizabeth Aaron and not otherwise, and, upon information and belief, that no action at law or otherwise has been brought by the said Ann Murphy, individually, or as administratrix, or by the plaintiff against the said Edward Murphy and Elizabeth Aaron, or either of them."

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The defendant claims that this cause of action is the personal claim of the administratrix and that this action is the personal action of Ann Murphy, that although she paid the money out as administratrix, which is admitted, yet she must sue in her own right to recover it. There is no proof whatever that Ann Murphy knew, at the time it is alleged she made the representations, that they were false. The assignment of Edward Murphy to the defendant is dated April 20, 1896. The assignment of Elizabeth Aaron to the defendant is dated November 20, 1895. The first decree was entered November 25, 1896. The second decree was entered April 15, 1897.

It is no defense to an action brought by an executor or administratrix, as such, to recover assets of the estate in the hands of defendant, or for the conversion thereof, that plaintiff has in his individual capacity been guilty of wrongdoing. The maxim *ex turpi causa non oritur actio* does not apply. Wetmore v. Porter, 92 N. Y. 76-82; Fellows v. Longyor, 9 id. 324-331; Deobold v. Oppermann, 111 id. 531-539; Hood v. Hayward, 124 id. 1-24; Boyle v. St. John, 28 Hun, 454-455; Place v. Hayward, 117 N. Y. 487-492; Colt v. Lasnier, 9 Cow. 320-321.

It is difficult to understand how an executor or administrator could bind the assets of his testator or intestate by an estoppel, when he could not by the most solemn contract known to the law. Austin v. Munro, 47 N. Y. 360; Rathbone v. Hooney, 58 id. 463-467.

Bigelow on Estoppel (5th ed.), at page 598, says: "The misrepresentation of a trustee in respect of the trust estate, to one having notice that it is such, will not work an estoppel upon an innocent *cestui que* trust. There is no case, it has recently been declared from the bench, in which a trustee, having made a fraudulent representation by which he was bound, or even a fraudulent conveyance after his legal title was confirmed, he still being a trustee only, has thereby deprived of their property the persons beneficially entitled to the estate." See also Sotters v. Cheeney, 74 Ga. 790-793.

And when a cause of action accrues to one who is an executor or administrator in a matter affecting the estate, after the death of his testator or intestate, the executor or administrator may, when the recovery will be assets, sue in his representative character or in his own name, at his option. 7 Am. & Eng. Ency. L. 362; 2 Wm. on Ex. (7 Am. ed.) 77-81; Bingham v. Marine Nat. Bank, 41

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Hun, 377-378; approved, Buckland v. Gallup, 105 N. Y. 453-457; Sperb v. McCoun, 110 id. 605-610; Schouler's Ex. and Admr. 292; Zimmerman v. Kinkle, 108 N. Y. 282, 287; Kane v. Paul, 14 Peters, 33; Hood v. Hayward, 124 N. Y. 1-24; Colt v. Lasnier, 9 Cowen, 320; Wetmore v. Porter, 92 N. Y. 76-82.

In the case at bar the question is presented whether the recovery sought here is assets of the estate, and that question must be determined. It appears that a decree was entered adjudging that Ann Murphy, as administratrix, had in her hands $753.40 to which the next of kin, as it was then supposed, of Patrick Murphy, to-wit: Elizabeth Aaron and Edward Murphy, were entitled; as Max Reinach, the defendant, had purchased these shares, the decree directed Ann Murphy, as administratrix, to pay the defendant out of the estate of Patrick Murphy in her hands $753.40, which she did. In a subsequent proceeding that decree was modified and the decree to pay Max Reinach $753.40 was vacated, and she, as administratrix, was directed to pay to Max Reinach only $350.14. Max Reinach was a party to those proceedings; here was an adjudication that the defendant held $413.25 of the assets of the estate of Patrick Murphy, to which he was not entitled.

This is not an action based upon a contract of the administratrix; the payment made under the decree of November 25, 1896, was not a voluntary payment; it might have been enforced by contempt proceedings; the element of assent, which is necessary to every valid contract, is wanting.

It has been held that an administrator, making a payment under a mistake of fact, may recover it back in that capacity. Clark v. Hougham, 2 Barn. & Cress. 149-153; approved, Bogert v. Hertell, 4 Hill, 508.

The plaintiff occupies the same position that Ann Murphy, as administratrix, occupied, and the objection that it was outside the lawful powers of the administratrix to assign a claim due the estate was not well taken. Rogers v. Squires, 98 N. Y. 53-56; Code Civ. Pro., § 502, sub. 3; People ex rel. Lawyers' Surety Co. v. Anthony, 7 App. Div. 132-135, 136.

By the assignment, Ann Murphy transferred to the plaintiff "all claims or causes of action which she has against said Max Reinach by reason of his having received any part of the estate of Patrick Murphy, it being the intention of this instrument to subrogate to the Lawyers' Surety Company of New York all the

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right, title and interest of Ann Murphy, as administratrix of Patrick Murphy, deceased."

The judgment should be affirmed, with costs.

FITZSIMONS, Ch. J., and OLCOTT, J., concur.

Judgment affirmed, with costs.

DAVID DENEHEY, as Administrator, etc., of ELLEN DENEHEY, Deceased, Appellant, *v.* MARGARET McCLOUD, Respondent.

(City Court of New York, General Term, March, 1898.)

Contracts — Promise to pay when able.

Proof that a debtor promised her creditor that she would "pay her more just as quick as she could," and that she (the debtor) "thought that she would pay her (the creditor) the balance monthly," does not tend to establish a promise to pay when able — rendering it a condition precedent, to a recovery upon the promise, that affirmative proof of an ability to pay be shown.

APPEAL from a judgment entered upon the dismissal of the plaintiff's complaint upon a trial before the court and a jury, and from an order denying the plaintiff's motion for a new trial.

Samuel I. Frankenstein, for appellant.

James A. Dunn, for respondent.

O'DWYER, J. The action is brought to recover the sum of $300, being a balance of an agreed purchase price of a half interest in a dry-goods store in New York city. The action is brought by an administrator, to whose intestate this cause of action was assigned by the original party to the agreement of sale, Maria A. Walsh. The complaint substantially sets forth,— that Maria A. Walsh, the assignor of said cause of action, and this defendant entered into a copartnership for the buying and selling of dry-goods, under the style of Tanahy & Co., Tanahy being the maiden name of this defendant. That said Maria A. Walsh contributed to the copartnership business as her share the sum of $350, and five months thereafter, it was agreed between the said Walsh and this

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defendant, that said Walsh should withdraw from said business and assign her interest therein to this defendant, in consideration whereof this defendant agreed to pay her the sum of $350. That pursuant to said agreement, said Walsh did withdraw from said business and did assign to this defendant her interest therein and that this defendant paid to said Walsh the sum of $50 on account thereof, leaving a balance due of $300, no part of which has been paid. That this claim of $300 was assigned by said Walsh to the plaintiff's intestate.

The answer substantially admits all the allegations of the complaint, except that it denies that the consideration for the sale of the half interest of said business was $350, and avers, to the contrary, that the agreed price was $100, which sum of $100 the defendant did duly pay to the said Maria A. Walsh pursuant to said agreement.

The only point in issue, therefore, was whether the original price was $350 or $100, and whether only $50 on account of the $350 was paid or whether the full sum of $100 was paid.

At the trial said Maria A. Walsh was called by the plaintiff, who testified to all the foregoing facts, and the plaintiff rested.

The defendant's counsel then moved to dismiss the complaint on the ground that it appeared from the testimony of the said Maria A. Walsh that the defendant agreed to pay her the $350 when she was able, and that there being no evidence that the defendant was ever able to pay it, the plaintiff had failed to make out a *prima facie* case, and that hence the complaint must be dismissed.

The court remarked that it appeared from the evidence that the defendant promised to pay when she could, and that, in order to entitle the plaintiff to a recovery, there must first be proof of the defendant's ability to pay.

But the fact is that there was no evidence that there ever was an agreement made between Miss Walsh and the defendant, that she, the defendant, should pay the purchase price only when she could or only when she was able to do so — and not otherwise.

Miss Walsh was recalled and testified that, after she had received from the defendant the first payment of $50 on account, the defendant promised that she would pay her more just as quick as she could; that she, the defendant, thought that she would pay the balance monthly, and that finally and about a year thereafter, when Miss Walsh again asked her for the payment of the balance,

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they both went to a notary public for the purpose of having the defendant execute her note to secure to Miss Walsh the payment of the balance, but a disagreement arose as to the amount for which the note should be made and nothing was done.

The motion to dismiss was then granted, upon the alleged ground that the evidence showed that there was an agreement made between Miss Walsh and the defendant whereby Miss Walsh agreed to postpone the payment of the purchase price of her half interest in the business until the defendant was able to pay it, or until she could pay it; and that hence, before a recovery could be had in this action, there must be affirmative proof of the defendant's ability to pay, and that such proof being lacking, the complaint must of consequence be dismissed, and to this ruling the plaintiff duly excepted. The motion was improperly granted, and it follows that the judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to abide event.

FITZSIMONS, Ch. J., and OLCOTT, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

JOSEPH KUCHER, Appellant, *v.* S. CROSBY CARRL, Respondent.

(City Court of New York, General Term, March, 1898.)

Action for rent and a holding over — When it sufficiently appears to which cause of action a separate defense is applicable.

The complaint in an action alleged a cause of action for the rent of the last month of a yearly letting expiring October 1, and, separately, a holding over after 12 o'clock, noon, of October 1. The answer contained a general denial and, separately, a defense that the plaintiff took possession before noon October 1.

Held, that the latter defense clearly referred to the second cause of action and that an order, that the defendant make his answer more definite and certain so that it might show to which cause of action his separate defense referred, was erroneous.

APPEAL from an order denying a motion made on the part of the plaintiff to strike out so much of the defendant's amended answer as constituted his separate, special and distinct defense.

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Hansen, Zinsser & Power, for appellant.

H. H. Glass, for respondent.

O'Dwyer, J. The plaintiff, for his first cause of action, alleges the letting of certain premises to the defendant for the term of one year commencing October 1, 1896, at a specified rent and the nonpayment of a portion of the rent due for the month of September, 1897.

For a second cause of action, the plaintiff alleges the holding over and continued possession of the premises by the defendant after the expiration of his term, at 12 o'clock, noon, on the 1st day of October, 1897.

The defendant interposed an answer putting in issue every material allegation of the complaint and also setting up, as a special, separate and distinct defense, the plea that the plaintiff entered upon and took possession of the demised premises on the 1st day of October, 1897, before 12 o'clock, noon, of that day.

A motion was subsequently made on the part of the plaintiff to compel the defendant to make said answer more definite and certain, which resulted in an order which required the defendant to amend his answer so as to show among other things "which cause of action set forth in the complaint the separate and distinct defense purports to answer."

In pursuance of that order the amended answer was served.

Thereafter another motion was made on the part of the plaintiff to strike out from said amended answer the defendant's separate and distinct defense, upon the alleged ground "that it failed to show which cause of action set forth in the complaint it purported to answer." The motion was denied, and from the order entered denying the same this appeal is taken.

The separate and distinct defense set up in the amended answer clearly and distinctly refers to the second cause of action of the complaint.

The motion was based upon the alleged ground "that the amended answer did not comply with the aforesaid order of this court in that it totally failed to show which cause of action set forth in the complaint the further separate and distinct defense purported to answer."

A mere inspection of the pleadings will show that the separate and distinct defense set forth in the answer clearly and distinctly refers to the second cause of action.

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There is no obscurity or ambiguity about the language used. By paragraphs numbered four and five, the defendant plainly refers to and answers the second cause of action and by paragraph numbered six "for a further, separate and distinct defense thereto" the defendant alleges that the plaintiff entered upon and took possession of said premises on the 1st day of October, 1897, before 12 o'clock, noon, of that day.

The order appealed from should be affirmed, with costs.

FITZSIMONS, Ch. J., concurs.

Order affirmed, with costs.

AMELIA PORATH, an Infant, by KATERINA PORATH, her Guardian, Respondent, *v.* SARAH J. O'SHAUGHNESSY, Appellant.

(City Court of New York, General Term, March, 1898.)

1. City Court of New York — Waiver of a preference upon the calendar by a failure to demand it in time.

Service, in the City Court of New York, of a notice of trial, not accompanied by the notice of a motion for a preference upon the calendar to which the plaintiff, as an infant, deems herself entitled, constitutes a waiver of the preference.

2. Same — An action for negligence cannot be placed on the short cause calendar.

An action predicated upon negligence, is not entitled to a place upon the short cause calendar of the City Court of New York, as that is designed for actions on contract which can be tried within an hour.

APPEAL from an order made at Special Term, granting the motion made by the plaintiff to place this action on the short cause calendar of this court, on the ground that the plaintiff is an infant suing by her guardian.

S. P. Cahill, for appellant.

Melvin G. Palliser, for respondent.

O'DWYER, J. The action was at issue by the service of an answer, on October 18, 1897, and a notice of trial was served by

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the plaintiff on the 19th day of January, 1898. Thereafter, on the 28th day of January, 1898, plaintiff served a notice of motion to place this action on the short cause calendar, under section 791 of the Code of Civil Procedure, subdivision 5, and with said notice of motion served an affidavit in support of the same, setting forth the right of the plaintiff to a preference.

The plaintiff, in order to avail herself of the right to a preference under section 791 of the Code of Civil Procedure, should have, at the time of the service of the notice of trial, served therewith a notice of motion in accordance with the provisions of section 793 of the Code of Civil Procedure.

The plaintiff, in her notice of trial, set forth an allegation "that plaintiff claims a preference for the reason that the sole plaintiff is an infant."

This certainly did not cover or fulfill the requirements of section 793 in regard to serving a notice of motion for preference with the notice of trial, for the material part of that section, on this appeal, distinctly says: "But the party desiring a preference of any cause shall serve upon the opposite party with his notice of trial a notice that an application will be made to the court at the opening thereof * * * ."

By the special rules of this court the application can be made at the Special Term instead of the Trial Term of this court, but rule 14 of the City Court Rules does not purport to, and can in no way override the distinct and clear provisions of section 793 which, in its reservation or exception, only allows the court to designate the time at which or the place where the application can be made.

It has been held that when the notice of trial does not contain, or is not accompanied by the notice of motion for a preference, the party desiring to move the cause on the preferred calendar thereby waives his right. Manhattan Ry. Co. v. Dunn, 13 Civ. Pro. 166; Fox v. Quinn, 12 N. Y. Supp. 725.

Furthermore, the cause has no place on the short cause calendar. That calendar is concerned with the trial of causes on actions on contract that can be tried within one hour and, before placing a cause thereon, it is necessary to make it appear that the same can be tried within that time. Rule 14, City Court Rules.

This action is brought to recover damages for personal injuries sustained through the negligence of the defendant.

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The order appealed from should be reversed, with $10 costs, and the motion denied, without costs.

FITZSIMONS, Ch. J., concurs.

Order reversed, with $10 costs, and motion denied, without costs.

Matter of the Proceedings Supplementary to Execution Brought by CHARLES W. MILLAR, Judgment Creditor and Appellant, *v.* WILLIAM WALL WEAVER, Judgment Debtor and Respondent.

(City Court of New York, General Term, March, 1898.)

Supplementary proceedings — Fraudulent transfer through a third party.

Upon an examination in supplementary proceedings of a third party, who originally held an interest in an estate as trustee for the judgment debtor, the judgment creditor is entitled to show that a transfer of this interest, made by the judgment debtor to another person, was a mere subterfuge, was intended to delay creditors, that the trustee himself furnished the consideration and that it was inadequate.

APPEAL from an order for the examination of a third party in supplementary proceedings.

J. Noble Hayes, for appellant.

Blair, Phelps & Lyman, for respondent.

FITZSIMONS, Ch. J. The judgment debtor having an one sixteenth interest, in an estate apparently valuable, transferred it to one Howard for $800, who stated that he agreed at the time said transfer was made that he, in turn, would transfer said interest to one Truslow whenever he was requested by Truslow to do so, and that Truslow had furnished him, he thought, with the consideration money paid to the judgment debtor.

At the time said transfer was made, Truslow held as trustee the one-sixteenth interest which the judgment debtor had in the estate in question, and was also the judgment debtor's cousin. Upon the examination of Truslow herein, he was subpoenaed as a third

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party for the purpose of showing that he held property of the judgment debtor. The judgment creditor endeavored to prove by him that the value of the property exceeded the consideration price paid, also that he paid the purchase price of said interest, instead of Howard, the alleged purchaser, and the value of the monthly rental of such interest also, when the transfer was made to Howard.

All questions in this line of examination the witness Truslow declined to answer, and the Special Term justice, upon motion, declared his examination closed without requiring him to answer them. In so acting, we think the learned justice erred.

The judgment creditor, upon this examination, had a right to show that such transfer was a fraud upon creditors, and that Truslow held such interest as a fraudulent transferee holding in fraud of creditors, and that said transfer was in fact a mere blind and subterfuge entered into between said debtor and Truslow for the purpose of preventing creditors from collecting debts due them from Weaver. 40 N. Y. 328.

If the answers to said questions showed a fraudulent sale then, of course, in an action brought by a receiver to set aside the transfer made, it would be set aside, and then honest creditors paid their claims as far as such interest would do so.

The very purpose of examinations of this character is to discover property of the judgment debtor; if found in his possession he must turn it over to a receiver or sheriff as directed by the court. If found in the hands of dishonest and fraudulent transferees such receiver may institute proper proceedings to recover the same, when recovered to apply it to payment of the judgment which caused his appointment.

The order appealed from should be reversed, and the witness Truslow must answer the questions which he refused to answer and any other questions which may be deemed proper by the Special Term justice.

Olcott, J., concurs.

Order reversed, with costs.

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HENRY VOGEL, Respondent, v. HENRY A. WEISSMANN, Appellant.

(City Court of New York, General Term, March, 1898.)

1. Parol evidence — Admissible, when completing an incomplete written contract.

Parol evidence, which is directed to the completion and sustention of a written contract in a respect in which it is incomplete, is admissible, and does not tend to avoid or alter the contract.

2. Same — Uncommunicated intention.

Evidence of the uncommunicated intention of one of the parties to a contract at the time when it was executed, is not admissible to vary its clearly expressed terms.

APPEAL from a judgment in favor of plaintiff, entered upon a verdict, and from an order denying a motion for a new trial.

Edward P. Schell and Abram I. Elkus, for appellant.

A. H. Berrick, for respondent.

OLCOTT, J. This is an appeal by the defendant from a judgment against him entered upon a verdict and from an order denying a motion for a new trial.

The action was brought to recover upon two causes of action, the first for labor and materials furnished pursuant to a written contract, the second for extra work incidental thereto. At the close of the case, however, all claim on the first cause of action was waived, and the case was narrowed to the claims embraced in the second cause of action. One of these last-mentioned claims was for a storm-door with oval glass furnished in place of one previously furnished with rectangular panes of glass. The last-mentioned door plaintiff claims to have been furnished in compliance with the terms of the written contract which called for "one pine storm-door with fancy embossed glass." Defendant sought to establish that, at the time of the execution of the written contract, it was orally specified that the door should contain oval glass, so that the door first delivered did not comply with the agreement, and that, therefore, the second door should not be charged as an extra item. In pursuance of such contention the defendant was asked by his counsel, "Did you not, at the time

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the contract was signed, say to Mr. Vogel (the plaintiff) that you wanted oval storm-doors, and did not Mr. Vogel agree to furnish them?" Plaintiff's counsel objected upon the ground that it was irrelevant and incompetent, and that all conversations with relation to this work were merged in the written instrument. The court sustained the objection, and defendant's counsel duly excepted. We think that the court erred in excluding this evidence, because it was not sought to vary the terms of the written instrument, but only to explain its intention, where its language was not sufficiently specific. The proposed testimony was directed to the completion and sustention of the written contract in a respect in which it was incomplete, and not at all to an avoidance or alteration of it. Lyon v. R. R. Co., 88 Hun, 27; McKee v. De Witt, 12 App. Div. 617; Thomas v. Scutt, 127 N. Y. 133. We do not, however, hold this error to be ground for reversal, because it was substantially cured, later in the trial, by the defendant being permitted, in response to the question, "You want this court and jury to understand that Vogel voluntarily took away the first storm-door and took away the embossed glass and substituted cut glass miter and oval glass and substituted another storm-door?" to answer, "Which he agreed to, yes." And, again the defendant testified, "When the original storm-door was brought there I saw that it had square corners. I then said to Vogel, it is not what we ordered — to send us what we ordered. I said to Vogel, that I wanted a storm-door with oval corners, as we agreed to. He did not say to me that I would have to pay the difference."

Another alleged error arose as follows: At a time, when, according to the great preponderance of evidence, most of the alleged extra work, as well as of that conceded to have been called for by the written contract, had been completed (although plaintiff sought to prove that little of the extra work had by that time been furnished), the defendant, at the earnest requests of the plaintiff and his son, paid $1,000 on account, although the job was not quite complete and, therefore, no payment was then due. At that time, as a result of the settlement of certain claims and disputes between the parties, the defendant received a paper of which the following is a copy:

"$1,000. NEW YORK, *October* 17, 1895.

"Received from Henry A. Weissmann, One thousand dollars on account, leaving a balance of Three hundred dollars, which

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will be paid when completed, which will be payment in full for all work done in the store, s. e. cor. 110th Street and Park Ave., city.

"HENRY VOGEL per JOHN VOGEL."

There is a dispute as to whether the plaintiff was personally present at the time of the execution and delivery of this instrument, but, at all events, it was signed by the plaintiff's son, John Vogel, who had in precisely the same manner signed the original written contract; he was with his father in business and attended to its details, and signed the contracts as plaintiff could not read or write; he was sent by his father to collect money from the defendant; and an examination of all the evidence convinces us, notwithstanding plaintiff's effort to profit by the agency of the son, when it was profitable, and to repudiate it when such a course appeared desirable, that the plaintiff held out his son as his agent for the purpose of all those dealings with the defendant, and that he is bound by them, having never notified defendant that his son's agency was revoked; so that we must hold the plaintiff chargeable with the obligation which his son assumed to impose upon him by the delivery of the instrument last above quoted. On the witness stand, the son was permitted (against a duly taken objection and exception by defendant's counsel), in answer to the question, "What did you mean when you signed this paper, which says that $300 was to be paid after the $1,000 was paid, for all work?" to testify, "I meant that the work we put in the store the work that we done according to the contract." Such question and answer should have been excluded under the well-settled rule that evidence of the uncommunicated intention of one of the parties at the time of entering into a written contract, is not receivable to vary the clearly expressed terms of such contract. Humphreys v. R. R. Co., 121 N. Y. 435, 444. For, the instrument last above quoted was not merely a receipt but an agreement in the nature of an account stated, by which, in consideration of the advanced payment of $1,000 on account and of the defendant's waiver of his objections to the work, the plaintiff agreed to take $300 as full settlement for the balance. When the learned justice charged the jury, he said, "It is for you to determine, first, whether any extra work was ordered by the defendant. If he ordered the extra work to be done, and Vogel did the work, he is entitled to the reasonable value or compensation for it. That

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is virtually all there is in the case. It is for you to say from all the evidence which has been introduced, whether Weissmann ordered Vogel to do this extra work, and, if Vogel, in consequence of that order, did work, he is entitled to pay or whatever the value of the extra work was, and that value you must judge from the evidence."

To this portion of the charge the defendant's counsel duly excepted, and he then asked the court to charge "That, if at the time the paper dated October 17, 1895, was executed and delivered to the defendant all the alleged extra work was done, the plaintiff cannot recover."

This request was declined and an exception taken.

We think that the learned trial justice's charge and refusal, above quoted (and which were not wholly corrected by the latter portions of the charge) following the admission of John Vogel's testimony, above referred to, that he meant the instrument of October 17, 1895, to refer only to the work done under the written contract, permitted the jury to divest their minds of any consideration of the effect of the instrument of October 17, 1895, or at least, permitted them to find that, even if all the alleged extra work was completed, or nearly completed on October 17, 1895, the plaintiff could still recover on the theory that the instrument of that date applied only to work under the written contract. This was fundamentally injurious to the defense; for it left uncontradicted the son's testimony, that he meant the paper to relate only to the contract work, a statement which, of course, could not be controverted, and which never should have reached the jury, and which, being admitted by the court against the objection, may well have influenced their verdict.

There were other objections noted; and considerations as to them, and as to other points in the case are ably raised by counsel for both parties; but nothing which the record presents seems to overcome the error which we have last discussed; and for that the judgment and order should be reversed, and a new trial ordered, with costs to appellant to abide event.

FITZSIMONS, Ch. J., and O'DWYER, J., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

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BLANCHE A. BURNELL, Appellant, *v.* WILLIAM F. COLES, Respondent.

(City Court of New York, General Term, March, 1898.)

Open commission — Order appealable — Reversal refused.

An order granting an open commission affects a substantial right and is appealable; but, when granted upon the motion of the defendant, will not be reversed unless there has been a clear abuse of discretion.

APPEAL from an order providing for the issuance of an open commission to take the examination of witnesses to be named therein, who may be produced before him.

Percival S. Jones, for appellant.

Moore, Bleecker & Wheeler, for respondent.

OLCOTT, J. This is an appeal by the plaintiff from an order entered upon defendant's motion, providing for the issuance of an open commission to a commissioner at Boston to take the examination of the witnesses, to be named in said commission, who may be produced before him by the defendant; and also of all witnesses who may be produced by the plaintiff.

The appellant contends that the moving affidavits are insufficient, that the commission was desired for the purpose of seeking evidence rather than recording it, and that an examination under a commission with interrogatories would have answered all the proper and essential purposes of the defendant.

It is not without interest, at this point, to note the history of the decisions of the appellate courts with relation to orders like that now under discussion. No longer ago than in 1874 the General Term of the Supreme Court held, in the case of Treadwell v. Pomeroy, 2 Sup. Ct. (T. & C.) 470, that an appeal did not lie from an order to take depositions on commission without the state, if the court had power to grant it, as it did not affect a substantial right. In the same year the same court (Wallace v. American Thread Co., 2 Sup. Ct. [T. & C.] 574) held that an order denying a motion for such a commission was appealable because affecting a

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substantial right, but otherwise with an order granting it. This, perhaps, over-nice distinction was disapproved by the Court of Appeals in 1881, in the case of Jemison v. Citizens Sav. Bank, 85 N. Y. 546, and certainly, from that time, there had never been a serious question raised as to such an order as that now under consideration being appealable. Nor does the respondent now raise that question. We have merely viewed the above-mentioned decisions as a background for that which may be discerned as the feature of the present rule upon that subject, that, though the order is appealable, it should not be reversed save for a clear and substantial abuse of that discretion which is especially intrusted to the justice at Special Term by section 894 of the Code.

So, the Court of Appeals, in Jemison v. Citizens Sav. Bank, *supra*, in deciding that an order for an open commission was appealable, made a special emphasis upon the possible abuse of discretion of the court below, arising from the fact that the witnesses were unknown and unnamed, and the place of taking their depositions at as expensive a distance as Texas. Neither of these features is found in the order now under consideration.

The general term of the Supreme Court in Lentilhon v. Bacon, 20 N. Y. Supp. 488, reversed an order for an open commission but especially upon the ground that it had been obtained upon the motion of the plaintiff who might have brought his action in a tribunal having jurisdiction over the place where his witnesses were. So, also, in the case of Hart v. R. R. Co., 67 Hun, 556; Darling v. Klock, 74 id. 248; and Einstein v. Gen. El. Co., 9 App. Div. 570, it was the plaintiff's commission which was complained of, while in the case at bar, the commission was granted upon the motion of defendant, who had no opportunity of selecting his forum, and who claims that he cannot procure his testimony without resort to the relief which was granted by the court below.

The appellant's counsel cites a number of other cases to support this appeal, but we believe that all of them are distinguishable from the case at bar, and as the sole question involved in such an appeal as this is whether the court below has abused its discretion, it must be answered in each case only after an examination of the moving papers, which, of course, never exactly parallel those which were passed upon in other cases and by other courts.

Such an examination discloses no error or abuse by the court below in this case. On the contrary the learned chief justice had

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"unsatisfactory proof by affidavit" (section 894 of the Code of Civil Procedure) before him and safeguarded his exercise of discretion by providing against the request and suggestion of the defendant that the names of his witnesses must be disclosed and inserted in the commission, while plaintiff might examine whom she pleased.

The court also minimized the expense of attending before the commissioner, by providing that he should proceed from day to day.

The order should be affirmed, with $10 costs, and disbursements.

O'Dwyer, J., concurs.

Order affirmed, with $10 costs, and disbursements.

Jacob Hepner, Respondent, *v.* James H. Maybury, Appellant.

(City Court of New York, General Term, March, 1898.)

Corporations — Liability of stockholder to promoter — Admissions.

A director and stockholder in a corporation is not liable to a promoter of it, for services rendered in organizing it, which the director never authorized originally nor ratified subsequently; nor is he bound by admissions, made out of his presence, by other stockholders who are not shown to have been his agents.

Appeal from a judgment in favor of plaintiff, entered upon a verdict, and from an order denying a motion for a new trial.

Hastings & Gleason, for appellant.

Arthur Falk, for respondent.

Olcott, J. This is an appeal by the defendant from a judgment, entered against him upon a verdict, and from an order denying his motion to set aside the verdict, and for a new trial.

This action was brought to recover the sum of $250 and interest, against this defendant, and Henry E. Marshall and Charles I. Bolles. Marshall was not served with process, and Bolles defaulted.

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The plaintiff is the assignee of the claim of George W. Bryam, which arose out of the latter's services in organizing a stock company. The defendant Maybury, in his answer, denied that Bryam rendered any services for him or upon his employment. On the trial this defendant duly excepted to evidence offered by the plaintiff of conversation between Bryam and other defendants when Maybury was not present. The learned trial justice allowed such evidence on condition that Maybury should, subsequently, be connected with the conversation. After plaintiff rested this defendant moved to strike out the testimony in regard to the conversation with Marshall, testified to by Bryam, on the ground that they had not been connected in any way with this defendant, and to a denial of that motion his counsel duly excepted. And, subsequently, he duly moved to dismiss the complaint and to a denial of that motion he duly excepted. We think that both of these motions should have been granted. There is an absence of any proof, either connecting this defendant with the conversations with Marshall, testified to by Bryam, or establishing any personal liability of this defendant to the plaintiff's assignor. The respondent seeks to sustain the verdict either on the theory of this defendant having constituted Marshall his agent, of which we find no legal evidence, or, on the theory of a subsequent ratification and acceptance by defendant of the services of the plaintiff's assignor.

This latter theory finds no support in the proofs. Only as an officer of the stock company and a subscriber to one share of its stock did this defendant accept the work of plaintiff's assignor in organizing the company; and there is no evidence whatever that at that time he knew or was informed that plaintiff's assignor was expecting or claiming to hold him personally responsible. On the contrary he repudiated such personal responsibility when he was first informed that plaintiff's assignor claimed it against him, and that was long after the services had been performed and acted upon. It is a premise to the doctrine of liability, arising out of ratification and acceptance, that the party to be charged must have been informed or have had reason to be aware that the services, which he accepts, are being charged against him, when they have been ordered by a person other than himself, and not connected with him, so as to have become his agent. Such a connection the evidence does not disclose between this defendant and either Marshall or Bolles.

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If an acquaintance hires a vehicle and invites me to ride with him, it is true that I participate in the benefits of the hiring, but I am not liable therefor unless I am previously made aware that the vehicle has been hired on the faith of my credit, or unless my friend had some authority from me to hire it.

"A promoter is not responsible for the contracts of other promoters in the absence of evidence that he has authorized the others to contract for him or pledge his credit." Taylor on Private Corporations, § 77.

The judgment and order appealed from should be reversed and a new trial granted, with costs to appellant to abide the event.

FITZSIMONS, Ch. J., concurs.

Judgment and order reversed, and new trial granted, with costs to appellant to abide event.

WILLIAM F. G. SHANKS, Plaintiff, *v.* ANTHONY STUMPF et al., Defendants.

(Supreme Court, Kings Trial Term, April, 1898.)

1. **Libel — Charging an editor with threatening dealers in bonds — Malice — Punitive damages.**

An article, shown by extrinsic evidence to have been published of the plaintiff, the editor and manager of a newspaper designed to inform investors in regard to municipal bonds, which, in substance, charges that the editor uses his newspaper to threaten, dog, spite and persecute dealers in bonds who refuse to patronize his newspaper, that he also uses it to cry down the bonds which these dealers purchase and which stigmatizes his practices as "utterly indefensible, infringing upon, if not crossing the line of downright criminality", is libelous *per se*, as matter of law; and, in the absence of proof of motive, justifies a recovery of punitive damages.

2. **Same — An answer not alleging that the libel is true of the plaintiff — Mitigation.**

An answer, which, after denying that an article was published of the plaintiff, states that "the facts forming the foundation of said alleged libel were received by the defendant in the ordinary course of business", that they were published "in the honest belief that said

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facts were true, and without any malice or evil design whatsoever, and defendants aver that the aforesaid article is true," does not sufficiently allege that it is true of the plaintiff and the answer is insufficient to mitigate damages.

ACTION for libel. Motion on the minutes to set aside a verdict of $5,000.

Sanders Shanks, for plaintiff.

James W. Ridgway, for defendants.

GAYNOR J.: The libelous publication is a severe stricture upon some unnamed individual. That the plaintiff was meant by it had to be proved by evidence *de hors*. The answer denies that it was published of and concerning him. The answer then states, "that the facts forming the foundation of said alleged libel were received by the defendants in the ordinary course of business", that they "were examined into and verified before publication", and that they were then published by the defendants "in the honest belief that said facts were true, and without any malice or evil design whatsoever, and defendants aver that the aforesaid article is true." This is no allegation that the article is true of the plaintiff. On the contrary, the answer denies that it was published of and concerning him. But if understood as an allegation that it is true of the plaintiff, it is not a good answer of the truth either as a defense, or as a partial defense, viz., in mitigation of damages; nor is it in terms so pleaded, as is required (Code Civ. Pro. secs. 507-8). What the "facts forming the foundation of said alleged libel", and which the answer says "were examined into and verified before publication", are, is not specified. Such defenses must set forth the particular facts which show the libelous statements to be true. A mere general averment of the truth of the libel does not amount to either defense, unless in a case where the libel itself consists of a specific statement of the facts (Wachter v. Quenzer, 29 N. Y. 547; Lanpher v. Clark, 149 N. Y. 472; McKane v. Brooklyn Citizen, 53 Hun, 132; Kingsley v. Kingsley, 79 Hun, 569). It follows that the evidence offered by defendant to prove the truth of the libel was properly excluded.

The charge that if the libelous publication was made maliciously, the jury could give smart money damages therefor, was correct. The libel itself was competent evidence of such malice, and the

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defendants did not become witnesses themselves, or offer any evidence of their motive, or of how they came to publish it. And the charge that if the jury found that the publication was made in wanton or reckless disregard of the rights of the plaintiff, or of others generally, such malice could be found therefrom alone, was also correct (Holmes v. Jones, 121 N. Y. 461; Prince v. Brooklyn Eagle, 16 Misc. Rep. 186; Ullrich v. New York Press Co., 23 Misc. Rep. 168).

The portions of the publication which the court specifically mentioned in charging the jury that the publication was libelous *per se*, and entitled the plaintiff to a verdict if the jury found that it was published of and concerning him, are the following:

"The arrogance and infallibility which spring from monopoly had become a source of great irritation to the public, which the original publication was intended to serve, and in course of time lead the management of that newspaper to degenerate into practices utterly indefensible, infringing upon, if not actually crossing, the line of downright criminality; and the unquestioned utility of the service, if properly performed, enabled the publication to which we allude to adopt a despotic attitude toward the whole-bond-dealing fraternity, interfering with the business of individual houses, dogging their managers with half-veiled threats of prosecution in its pages, and exercising a general terrorism, from which there did not appear to be any feasible avenue of escape."

"Some time ago the city of Camden, N. J., made a private sale of bonds, as the law permitted, it being optional on the part of the proper authorities to take such method of selling the bonds or canvassing them publicly. It appears that the purchaser of these bonds had refused to do any further business with the proprietor of the news sheet, upon whose methods he now sits in judgment, and to spite the bond dealers, he then began to assail the credit of the city which had sold the securities."

"This assertion of exclusive control over the sources of news is adopted only to reinforce the importance of his sheet to bond dealers, when the latter refused to be coerced into subscribing or advertising under the threat of being publicly scourged."

The plaintiff was the editor and manager of a newspaper devoted to the giving of information concerning municipal bonds to investors, and the libel concerned his conduct in that capacity. These extracts show its tenor, which amounted to a charge that the plaintiff used the said newspaper and his said control of it to threaten,

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dog, spite and persecute dealers in bonds who refused to subscribe for or advertise in his said newspaper, and to cry down the bonds they purchased, his practices being "utterly indefensible, infringing upon, if not actually crossing the line of downright criminality." There being no ambiguity about the words, it is always a question of law for the court whether they are libelous (Moore v. Francis, 121 N. Y. 199). The words here are certainly very derogatory to the plaintiff. They impute to him dishonest, dishonorable, immoral and degrading conduct, and that constitutes a libel (Odgers, ch. 2, part 1).

I think as such verdicts go that this verdict is too high, and it will therefore be set aside unless the plaintiff stipulate to reduce it to $1,500.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Relator, *v.* LUCIA DEWEY, Respondent.

(Supreme Court, New York Special Term, April, 1898.)

1. **Habeas corpus — Foreign adjudication on habeas corpus — Estoppel.**
Where there is no proof of the effect, under the law of a foreign state, of a determination, there made under a writ of *habeas corpus* issued to procure the custody of a child, the New York rule, that such a determination is conclusive only where the facts are identical, must govern. Where the record in the foreign state is not produced in *habeas corpus* proceedings taken in this state, it cannot be assumed that the facts are identical and the foreign determination constitutes no estoppel to the proceedings taken in this state.

2. **Same — Writ illegally served on Sunday — Waiver.**
The foreign determination, impeachable in the interests of the child, can afford no estoppel where, contrary to the law of this and of the foreign state, the foreign writ of *habeas corpus* was served on Sunday. Such a defect is not waived by the appearance in the foreign court of the person in custody of the child, nor by her pleading to the writ, nor by that court's denial of a motion to quash the writ for invalidity in its service.

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3. Same — Civil status of the child established by the domicile of the divorced mother — Power of foreign court.

Where the mother, and the actual custodian at all times of the child, has, after having procured a divorce from her husband (the relator in the present proceedings), upon the ground of abandonment (which decree made no disposition of the child), established a domicile in the state of New York and maintained the same for four years, her civil status establishes that of her child and a foreign court has no power, while she and her child are temporarily sojourning in the foreign state, to regulate the relations between them upon the return of a writ of *habeas corpus* procured by the present relator.

HABEAS CORPUS proceedings for the possession of an infant. The opinion states the case.

Otto H. Wefing (Amos H. Evans, of counsel), for relator.

John A. Grow (A. J. Booty, of counsel), for respondent.

PRYOR, J. In *habeas corpus* for the possession of a child, the relator relies upon an order or decree in a like proceeding in a County Court of Texas, awarding custody to him — conceding that unless such order or decree be conclusive of his right, the writ should be dismissed.

Full faith and credit must be given in each state to the judicial proceedings of every other state (U. S. Const., art. 4, § 1); and they shall have such effect in any court in the United States, as they have by law or usage in the courts of the state in which they are taken. Act of Congress, May 26, 1790.

Assuming the validity of the Texas proceeding it is not apparent that, in that state, a determination upon *habeas corpus* for the custody of a child, has the binding and indefeasible effect of *res judicata;* and in the absence of proof of the foreign law, the *lex fori* furnishes the rule of decision. Monroe v. Douglass, 5 N. Y. 447. In New York a determination upon *habeas corpus* as to the custody of a child is a definitive and conclusive adjudication only on an identical state of facts (People ex rel. Barry v. Mercein, 3 Hill, 399; People ex rel. Keator v. Moss, 6 App. Div. 414); and the record fails to satisfy me that the present condition of this child and the parents is such as to compel obedience to the mandate of the Texas court. In an action the

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party alleging the estoppel of *res adjudicata* must clearly establish it (Zoeller v. Riley, 100 N. Y. 102; Bell v. Merrifield, 109 id. 202); and in *habeas corpus* the relator is under the same obligation. In re White, 45 Fed. Repr. 237, 239. The evidence in the Texas proceeding not being before me, I am unable to say that the case then made is identical with the case now presented. State v. Brearly, 5 N. J. L. 555, 561.

Whatever effect may be allowed to an adjudication in *habeas corpus* by the jurisdiction rendering it, it has no operative force in another state; because "the decision of the court there could in no respect bind this court. The inquiry and command of that court must be bounded by the state in which it sat." State v. Brearly, 5 N. J. L. 555, 561; Maria v. Kirby, 12 B. Monroe, 542, 545.

But however conclusive the Texas decree upon the right of the litigants, the child not being a party is not affected; and its interest must determine the present controversy. Brewer, J., in the Matter of Bort, 25 Kan. 308; 37 Am. Rep. 255.

Conceding, however, the efficacy of *res judicata* to the Texas decree, if valid, it is open to the respondent to challenge it (Hunt v. Hunt, 72 N. Y. 217, 225; Atherton v. Atherton, 155 id. 129, 134); and she impeaches it for defect of jurisdiction in the court to render it.

By the law of New York "no writ, process, order, judgment, decree or other proceeding of any court or officer of justice," except in criminal cases, "shall be served or executed upon the first day of the week, called Sunday." 1 Rev. Stat. 675, § 69. In Texas "no civil suit shall be commenced, nor shall any process be issued or served on Sunday, except in cases of injunction, attachment, garnishment, sequestration or distress proceedings. Rev. Stat. of Texas, 1895, art. 1180, as amended in 1897. Indeed, at common law Sunday was *dies non juridicus* as to process. 1 Robinson's Practice, chap. 72, p. 389; Story v. Elliot, 8 Cow. 27, note, p. 31.

Even when instituted for the relief of an alleged criminal *habeas corpus* is a civil proceeding (*Ex parte* Tom Tong, 108 U. S. 556); and *a fortiori* is it such when invoked to determine the custody of a child. Legate v. Legate, 87 Tex. 248.

It is conceded that in the present instance the writ was served on Sunday. Such service, forbidden by the law of Texas, was a nullity, and the proceedings founded upon it void. Roberts v. Monkhouse, 8 East, 547; McIlehaw v. Smith, 8 T. R. 86; Taylor v.

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Phillips, 3 East, 155; Merrett v. Earle, 31 Barb. 38, 41; Van Vechten v. Paddock, 12 Johns. 178; Butler v. Kelsey, 15 id. 177; Pulling v. People, 8 Barb. 384; Allen v. Godfrey, 44 N. Y. 433; 24 Am. & Eng. Ency. of Law, 574; Coleman v. Henderson, 12 Am. Dec. 290, note; Crabtree v. Whiteselle, 65 Tex. 111.

It is answered that by appearing and pleading, the respondent waived the irregularity and gave the court jurisdiction. The contention is untenable. In Taylor v. Phillips, 3 East, 155, Lord Ellenborough, Ch. J., said: "It was a matter of public policy that no proceedings of the nature described in the statute should be had on Sunday; and, therefore, the regularity or irregularity of them could not depend on the assent of the party afterwards to waive an objection to such proceedings, which were in themselves absolutely void." Cited with approval, 12 Johns. 181.

The Texas court having denied a motion to quash the proceeding for invalidity in the service of the writ, the relator insists that the decision is conclusive of the regularity of the proceeding. But, "if the court has not acquired jurisdiction of the person of the defendant — that is, if no sufficient process has been served upon him — there can be no judgment, even of abatement, given against the plaintiff, for the defendant must become a party in the court before he can have a judgment." King v. Poole, 36 Barb. 242, 244. And if no judgment be possible for the defendant, much less may there be a judgment against him. Without cognizance of the cause, any order in it, if not of dismissal, is necessarily a nullity; and the decision of the court that it had jurisdiction is of no avail against the contrary fact.

The obvious and inevitable inference is, that the so-called adjudication in the Texas proceeding is inoperative as an estoppel.

But for another and independent reason that pretended adjudication is ineffectual to uphold this proceeding. In October, 1893, the respondent obtained a divorce from the relator on the ground of abandonment. By the decree no disposition was made of the child, but it remains with the mother and is maintained by her exclusively. The divorce enabled her to establish a domicile for herself (Bennett v. Bennett, Deady, 299; Vischer v. Vischer, 12 Barb. 640); and for four years she, with the child, has been a resident citizen of the state of New York. By the abandonment of the child and neglect to support it, the relator relinquished his paternal right (Wilson v. McMillan, 35 Am. Rep. 118, note); and thereupon the guardianship of the child devolved upon the

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mother. As natural guardian, she was competent to change her ward's domicile (Jacobs on Dom., § 255); and this she did by bringing the child into the state of New York. Her domicile became its domicile.

At the time, then, of the Texas proceeding, both mother and child were domiciled in the state of New York; and it was beyond the power of the Texas court to regulate the relations between them. The relation of parent and child is a civil status. 1 Bish. on M. & D., § 16. "It is plain that every state has the right to determine the status, or domestic or social condition of persons domiciled within its territory." Hunt v. Hunt, 72 N. Y. 217, 227; Strader v. Graham, 10 How. (U. S.) 82. "Every nation may determine the status of its own domiciled subjects, and any interference by foreign tribunals would be an officious intermeddling with a matter in which they have no concern. The parties cannot consent to the change of status, and the judgment is not binding in a third country." Black on Jurisdiction, § 77. When the Texas proceeding was instituted the respondent and her child were transiently in that state, upon a temporary occasion and with the intention of returning to their domicile in New York. "Though a state may have a right to declare the condition of all persons within her limits, the right only exists while that person remains there. She has not the power of giving a condition or status that will adhere to the person everywhere; but upon his return to his place of domicile he will occupy his former position" (Maria v. Kirby, 12 B. Monroe, 542, 545, a case in which the decision is an adjudication of the precise point in controversy.

It results, therefore, that the Texas decree is of no effect in this state upon the right of the respondent to the custody of the child.

The validity of that decree is further impugned for fatal irregularities in the proceeding, but its futility as an estoppel being already apparent, the discussion need not be prolonged.

The writ is dismissed; and as the respondent's fitness for the care and control of the child is not questioned, it is remanded to her custody.

Ordered accordingly.

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NATHAN CLARK et al., as Trustees under the Last Will and Testament of NATHAN CLARK, Deceased, Plaintiffs, *v.* HARRISON CLARK et al., Defendants.

(Supreme Court, New York Special Term, April, 1898.)

1. **Trusts — Suspension of power of alienation — Rejection of void ulterior limitations — Vesting of remainders — Direct gift, with postponement of delivery.**

By the second clause of a will of personal property a testator, having two sons, Nathan and Harrison Clark, gave to his grandson Harrison Clark, Jr., $20,000, to be held by trustees for his benefit until he reached the age of thirty years, when he became entitled to the principal. By the third clause the testator gave one-half of his residuary estate to his son Nathan absolutely and the other half to trustees. They were directed to hold their half during the joint lives of the son Harrison and his wife and for their benefit and, upon the death of the survivor, until the youngest of their children (four in number) who might survive them should attain the age of thirty years and thereupon the surviving children were to take equal shares. By the third clause he further directed that, if his grandson Harrison Clark, Jr., died before reaching the age of thirty years, the principal of his share should be added to the trust which he had created for the benefit of his son Harrison, his wife and family.

Held, that the trust in favor of Harrison Clark and his wife was void because it was not limited by two lives in being at the death of the testator; and that the trust in favor of the grandson Harrison Clark, Jr., was made void by the provision of the third clause that it should, in the event of his dying before the age of thirty years, be added to the trust created in favor of Harrison Clark, his wife and family.

That, in view of the manifest intentions of the testator, the ulterior void limitations, contained in the third clause, could and should be cut off. That it should be held that the estate created by the third clause for the benefit or Harrison Clark and his wife, vested, upon the death of the testator, in their four children, subject to the life estate of their parents and subject to be defeated by the death of a child during the running of the life estate.

That the provision for Harrison Clark, Jr., as made by the second clause, should be deemed a direct gift, with postponement of actual delivery until he reached the age of thirty years and that, in case he died before attaining that age, the principal would pass to his heirs.

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2. Same — Directions to testamentary trustees which take the fund out of the jurisdiction.

A testamentary direction to trustees to invest trust moneys "in first mortgage notes, secured on real estate in the city of Chicago, Ill.," is mandatory and must be followed, although it takes the trust funds beyond the jurisdiction of the court.

3. Same — Manner of investment.

In following a testamentary direction to trustees, "to invest said trust fund in first mortgage notes, or other first-class securities, which will bear as high a rate of interest as said trustees shall deem consistent with the safety of the investment," they must see that the securities are first-class, safe and proper for investment by trustees and should select from such securities those which bear the highest rate of interest.

4. Same — When trustees need not see to the application of a payment.

The responsibility of testamentary trustees, who are authorized to determine the part of a trust fund which they shall pay to the wife of the son of the settlor for her use and that of her children, ceases when they have determined upon and made the payment and they need not supervise its expenditure.

5. Same — Their discretion, in apportioning a fund, will not be reviewed unless abused.

Where testamentary trustees are given discretion to determine how much of the income of a trust shall be given to a husband and how much to his wife, for her use and that of her children, the court will not attempt to control the discretion exercised in the matter by the trustees, unless there has been an abuse.

ACTION for the construction of a will.

F. L. Crawford, for plaintiff.

Henry N. Tifft, for defendant Harrison Clark.

James Armstrong, for defendant Josephine L. Clark.

Pierre M. Brown, guardian *ad litem* for defendant Harrison L. Clark, Jr.

William W. Jenks, guardian *ad litem* for defendants Ethel Mary Clark, Violet Amelia Clark and Gladys Clark.

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FREEDMAN, J. This action is brought to construe the will of Nathan Clark, deceased, in reference to the trusts created by the second and third clauses thereof.

Said clauses are as follows, to-wit:

"Second. I give and bequeath to my grandson, Harrison Clark, the sum of twenty thousand dollars ($20,000) to be held in trust for him by my son Nathan Clark, Percy B. Heilner and Gilbert Holmes Crawford, until he shall have arrived at the age of thirty years, when said trustees or their successors shall pay over to him the principal of this bequest, together with such additions thereto as may then be remaining in their hands. I direct that said trustees shall, as soon as practicable after my death, invest said sum of twenty thousand dollars ($20,000) in first mortgage notes, secured on real estate in the city of Chicago, Illinois, and that the income from such investment shall be paid semi-annually to his guardian, until he shall have attained his majority, and then semi-annually to him, until he shall have attained the age of thirty years as aforesaid.

"Third. I hereby give, devise and bequeath one-half of the remainder of my estate, of every kind and nature whatsoever and wheresoever situated, to my son Nathan, to be his absolutely, and the other half of said remainder, I give, devise and bequeath to my son, Nathan Clark, Percy B. Heilner and Gilbert Holmes Crawford in trust for the following purposes:

"1st. To invest said trust fund in first mortgage notes, or other first-class securities, which will bear as high a rate of interest as said trustees shall deem consistent with the safety of the investment.

"2d. To pay semi-annually so much of the income derived from such investment as they may think necessary for the comfortable support of my son Harrison, they keeping in view the necessities of his wife and children and the remainder of such income, semi-annually to Josephine, wife of my said son Harrison, for the use of herself and children.

"In thus providing for the support of my said son Harrison, and his wife and children, I intend to and do give to my said trustees, large discretion as to how they shall divide such income, desiring that they should act with reference thereto, as they think I would act if living.

"In the event of the death of my grandson, Harrison, before he shall have attained the age of thirty years, I direct that the bequest

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hereinbefore made to him shall be added to the trust fund provided for my son Harrison, and his said wife and family, to become a part thereof and to be managed by them, by said trustees, in the same manner as they are directed to manage the specific bequest herein made to them for the use of my said son Harrison, and his wife and family.

"In the event of the death of my said son Harrison, prior to the death of his said wife, Josephine, I direct that the portion of said income which would otherwise, under the provisions of this will, be paid to him, shall be paid to his said wife, Josephine, for the use of herself and children, and in the event of her death, that the portion of said income which would otherwise be paid to her for the use of herself and children, shall be paid to the guardian of such children, if they are minors. In the event, however, that at the time of the death of said Josephine, all of the children of my said son Harrison and his said wife, Josephine, shall have attained their majority, then the portion of said income which would have been paid to their mother, if living, for her and their use, shall be paid in equal parts to such of said children as may then be surviving.

"In the event of the death of my said son Harrison and his said wife, Josephine, leaving children surviving them, I direct that the trust fund herein provided for them and their children shall be held by my said trustees or their successors, until the youngest of such surviving children shall have attained the age of thirty years, when each one shall receive an equal portion of the fund so held in trust for them by my said trustees."

The testator, Nathan Clark, died May 1, 1895. At the time of his death he was a resident of the state of New York, and a widower and left him surviving, his son Nathan Clark, a plaintiff herein, and his son Harrison Clark, a defendant herein, his only heirs-at-law and next of kin, both of whom are now living.

The defendant, Josephine Clark, is the wife of the testator's son Harrison, and the defendants, Harrison Clark, Jr., Ethel Mary Clark, Violet Amelia Clark and Gladys Clark are all the children of said Harrison and Josephine, who survived the testator and are all still living and under age.

The questions arising upon the paragraphs above set forth and as to which the judgment of the court has been invoked by the complaint in this action, are as follows:

First. Whether the trust created by said testator in the second paragraph of said will for his grandson, Harrison (said grandson

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being the defendant Harrison Clark, Jr.), is valid in whole or in part; whether the said provision for said grandson can be sustained as a direct gift without reference to the validity of the trust subsequently created; whether the trust is valid at all events during the lifetime of the said testator's grandson, and whether if valid to that extent and no further, the principal of said fund shall be paid to the said grandson if he arrive at the age of thirty years, or to his legatees or next of kin if he die before reaching that age, or whether said trust fund vested in the testator's next of kin upon his death subject only to the life interest of his grandson, Harrison.

Second. Whether the trust created as to one-half of the residue of testator's estate in the third paragraph of said will is valid and enforcible in whole or in part; whether the said trust if not valid in its entirety is valid during the lives of the defendants Harrison Clark and Josephine Clark; whether upon the death of the survivor of the said defendants Harrison and Josephine Clark the said fund held in trust during their lives will vest in absolute ownership immediately, share and share alike, in their then surviving children, with postponement of payment of the shares until the youngest of such surviving children shall reach the age of thirty years, the income of the shares to be paid meanwhile in equal parts to such surviving children respectively, or whether the said fund so held in trust vested on the testator's death in his next of kin subject only to payment of the income thereof to the defendants Harrison Clark and Josephine Clark during their lives as directed in his said will, the said fund to be distributed to such next of kin of testator upon the death of the survivor of said life beneficiaries, and whether in the event last above supposed the said defendant Harrison Clark has the right to assign or dispose of by will any interest in remainder in said trust fund.

Third. Whether, if the said trust created by the third paragraph of said will in one-half the residue of said estate be declared valid in whole or in part, the trustees appointed therein are authorized by the terms thereof to invest said fund in securities which in their opinion are "first-class," without regard to the usual rule governing investments by trustees, and whether said trustees are authorized or obliged to invest the trust fund for Harrison Clark, Jr., as directed in said will.

Fourth. Whether the said trustees are charged with any, and if any, with what responsibility respecting the disposition of the income to be paid to the defendant Josephine Clark for the use of

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herself and her children after the same has been so paid to her, or whether under the said will she is invested with full discretion to determine what part of the income so paid to her shall be used for the benefit of her children.

The intention of the testator as revealed by the general scheme of the will was to set apart the sum of $20,000 to the use of his grandson, the defendant Harrison Clark, Jr., and to create a trust for that purpose, and, after having done this, to divide the remainder of his estate into two equal parts, one of which was to go immediately and absolutely to his son Nathan Clark, while the other was set apart in trust for the benefit of his son Harrison and said son's family.

Both trusts, viz.: the trust for the benefit of the grandson and the trust for the benefit of the son Harrison and his family, have reference to personal property, and both are, when each is considered in its entirety and full effect is given to each, in contravention of the statute forbidding the suspension of the absolute ownership for more than two lives in being. The reasons are as follows:

As to the residuary estate: One-half of the residuary estate is to be held in trust for the joint lives of Harrison and Josephine Clark, and upon the death of the survivor of these two the trust is to continue until the youngest of their children, who may survive them, shall have attained the age of thirty years, when each of said surviving children is to receive an equal portion of the principal of the trust fund. Thus it appears that the fund in question may remain in the hands of the trustees for two lives and for an uncertain period after the expiration of these two lives.

As to the trust fund of $20,000 — for the benefit of the grandson, Harrison Clark, Jr.:

This fund is to be held in trust for the benefit of said grandson until he shall reach the age of thirty years, when the principal is to be paid to him, he to receive the income meanwhile. But if he die before reaching the age of thirty years, then the principal is to be added to the other trust fund created for the benefit of the testator's son Harrison and his family and is thereafter to be treated as a part of the latter.

Thus the absolute ownership of the $20,000 fund may possibly be suspended for the life of the testator's grandson, and also for the lives of the testator's son Harrison, and the wife of the latter.

Now if either or both of these trusts were declared wholly invalid and the rest of the will be permitted to stand, results would

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follow against which the testator clearly intended to guard by making a will.

If the trust of $20,000, for the benefit of his grandson, be declared void, the latter would lose all benefit thereunder, and yet the clear intent of the testator was to make a special provision for him over and above his ordinary share.

So upon a careful reading of the entire will the clear intention of the testator was, after the creation of the trust fund of $20,000, for the benefit of his grandson to divide the remainder of his estate into two equal portions, one of such portions to be given to his son Nathan absolutely, and the other portion to be held in trust for the benefit of his son Harrison and his family.

There is no intention which can be read into the will that Nathan should have more than one-half of said remainder, yet, if the trust for the benefit of the son Harrison and his family shall be declared void and the rest of the will declared valid, Nathan would be entitled to one-half of the remainder absolutely and one-half of the fund in trust, or three-fourths of the whole remainder, which was clearly not the intention of the testator.

Again, if the trust last referred to shall be considered good during the lives of Harrison and Josephine Clark, and invalid thereafter, then the whole trust fund after the death of Harrison and Josephine will go to the heirs of the testator, one-half thereof to the testator's son Nathan absolutely and the other share to the surviving children of Harrison, which will give Nathan three-fourths of the entire remainder of the estate, which was clearly not the intention of the testator.

In every aspect of the case it would be clearly against the wishes of the testator as declared in his will as well as manifestly unjust to Harrison and his family, to give three-fourths of the estate to Nathan, and hence it seems that if the trust for the benefit of Harrison and his family must be declared void, the whole testamentary disposition attempted in the third paragraph of the will should be declared void.

But this would also lead to a result against which the testator wished to guard.

For some reason the testator desired not to give the control of that portion of his estate placed in trust for his son Harrison and family, directly to Harrison, and yet if the said trust fails and the court decides the whole third paragraph void by reason of the void

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trust, then one-half of the estate will go to and be under the absolute control of Harrison.

It, therefore, remains to be seen whether a liberal construction cannot be adopted which will validate and carry into effect at least the main part of the testamentary scheme of the testator and yet not be in violation of the law of this state. If this can be done, it should be done, especially as the rule is well settled that partial intestacy should be prevented where by a liberal and yet feasible construction it is possible to avoid it.

A search for some case which has exactly the same state of facts as the one before the court has resulted in finding no case which fully covers the question here presented. The Court of Appeals says: "Each case must rest upon its own peculiar facts." Greene v. Greene, 125 N. Y. 512. There are numerous cases, however, which hold that where a trust is in part good and in part bad, the good may be retained and the bad stricken out as long as the intention of the testator and the general scheme of the trust can be carried out.

In the case of Harrison v. Harrison, 36 N. Y. 543, the Court of Appeals says: "It is a fundamental principle of construction in regard to all instruments and contracts that the instruments should rather be made available than suffered to fail. Effect should be given to the whole instrument, and to every part of it, if it can be done without violating the rules of law."

"The principle is now well settled that the courts lean in favor of the preservation of all such valid parts of a will as can be separated from those that are invalid, without defeating the general intent of the testator.

"It is no objection to the application of this rule to the case at bar, that the limitations, as well those which are good as the one alleged to be bad, are embraced in a single trust. A single trust created for two purposes, one lawful and the other unlawful, is good for the lawful purpose, although void for the unlawful one." Page 548.

To the same effect are Van Schuyver v. Mulford, 59 N. Y. 432; Manice v. Manice, 43 id. 303; Brown v. Richter, 76 Hun, 472; Kennedy v. Hoy, 105 N. Y. 134; Henderson v. Henderson, 113 id. 15.

In the recent case of Greene v. Greene, 125 N. Y. 506, the following significant language was used by the Court of Appeals at p. 512:

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"If it is urged that the inhibition against a partition, or a division of the estate, for a period of six years, and the restriction upon the power of alienation are provisions which, for their illegality affect the will. The answer is that as invalid limitations upon the free ownership of the property devised, they are void and may be disregarded.

"The present case illustrates the peculiar character of cases involving a construction of wills. Each case must be determined upon its own particular facts and features, and former precedents are rarely availing in the office of construction. The supreme importance of giving effect to the last will of the decedent requires the court to search out his intention and to validate his scheme, unless to do so would contravene the statute. The endeavor is to find a way of upholding the will, not of breaking it down, and thus in every case the inherent purpose, if lawful, should be effectuated through what legal channels of construction may be open. We should not make a new will for the testator, and we need not strain to support his testamentary plan, if the object is unworthy, or commands our just condemnation."

The question then arises in the case at bar whether the general principles enunciated in the foregoing cases can be applied so as to cut off the ulterior limitation over, contained in the trust created by the third paragraph of the will.

If this ulterior limitation over be cut off, then and in that event, the evident intention of the testator can be carried out so far as the main part of the trust is concerned.

From the oral argument it seems that all of the parties interested desire that the trust may be declared valid.

But such ulterior limitation over cannot well be cut off unless it then can be held that, notwithstanding the devise of the said trust estate in form to trustees for the purposes of the trust, the estate so created by the testator vested upon his death in the four children, then living, of Harrison and Josephine Clark, subject to the life interests of their parents, and subject to be defeated as to any such child by death without issue during the running of the life estates.

The question whether in that case there is such a vested remainder, within the limits stated, involves a careful examination of the state of the law under the statute against perpetuities, existing at the time of the death of the testator.

The trust under consideration relates to personal property. As to such property the statute at that time provided and still pro-

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vides that " The absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator, and that in all other respects, limitations of future or contingent interests in personal property, shall be subject to the rules prescribed in relation to future estates in lands." Rev. Stat. (9th ed.), vol. II, p. 1857; Personal Property Law (chap. 47 of the General Laws) of 1897, chap. 417, p. 507, § 2.

At one time it was thought that suspension of the absolute ownership of personal property could be effected only by the creation of a future contingency, and not by the creation of any personal property trust. But it is now decided that it may also be occasioned by certain trusts, even though all interests are absolutely vested. Haynes v. Sherman, 117 N. Y. 433; Brewer v. Brewer, 11 Hun, 147.

But in each case the only question to be determined is whether the absolute ownership is suspended beyond the statutory period.

The statutory period consists of " two lives in being." The suspension, therefore, must be bounded strictly by two lives in being, and the crucial test is whether the limitations are such that the property must, within two lives in being, if ever, become absolutely vested in beneficial owners.

As a general rule, where there is no gift, but by a direction to executors or trustees to divide or pay at a future time, the vesting in the legatee will not take place until that time arrives. In such a case the gift is future and not immediate; it is contingent and not vested. Shipman v. Rollins, 98 N. Y. 311 (327); Smith v. Edwards, 88 id. 92; Greenland v. Waddell, 116 id. 234 244); Delafield v. Shipman, 103 id. 463.

This is sometimes expressed by saying that if futurity is annexed to the substance of the gift, vesting is suspended. Everitt v. Everitt, 29 N. Y. 39 (75).

But where the gift is absolute and the time of payment only postponed, here time, not being of the substance of the gift, but relating to the payment, does not suspend the gift, but merely defers the payment. Goebel v. Wolf, 113 N. Y. 405 (412); Savage v. Burnham, 17 id. 561 (575).

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Inasmuch as a general proposition, absolute ownership implies the right of possession, it has frequently been urged that a postponement of possession must necessarily involve a suspension of the absolute ownership of personal property. But this is not the law of New York. In Bliven v. Seymour, 88 N. Y. 469 (478), it was said that " whatever was said in Converse v. Kellogg, 7 Barb. 596, which warrants an inference that such deferring of payment (of a *vested* legacy) amounts to a suspension of the absolute ownership, has no sanction in the decisions of this court."

And it was thereupon held that such a provision does not occasion suspension.

Indeed it seems to be fully settled now that the presence, in the instrument, of restrictions on mere possession does not occasion a suspension of the absolute ownership of personal property. Whether, in any given case, the restriction is void and, therefore, harmless; or is valid as a power in trust in the executors consistent with absolute vesting and with full right in the legatee to sell, assign, release or bequeath; in either event, the net result, so far as the subject of suspension is concerned, is the same, for in either event the provision for postponement of possession does not involve suspension of the absolute ownership. Vanderpoel v. Loew, 112 N. Y. 167 (186); Oxley v. Lane, 35 id. 340 (344-345); Beekman v. Bonsor, 23 id. 298 (317); Everitt v. Everitt, 29 id. 39; Manice v. Manice, 43 id. 303.

The authorities in this state favor the theory of immediate vesting both as to real and personal property, although the statutes relating to the kinds of property differ. The statute relating to real estate forbids the suspension of the absolute power of alienation for more than two lives, while the statute relating to personal property forbids the suspension of the absolute ownership for more than two lives. But the statutory period is the same in both cases. It consists of two lives in being. As to both kinds of property the authorities in this state favor the theory of immediate vesting, and the courts are always willing to shape their decisions in doubtful cases with reference to these authorities. Indeed it may be said that even where there are no words implying an immediate gift, and the title is nominally conveyed to trustees for the purposes of the trust, if the courts, from the will as a whole, can spell out a tenancy in common, they will do so for the purpose of declaring a direct vesting and avoiding a forfeiture.

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The growth of this doctrine in this state has been so fully pointed out and the authorities illustrating the same so fully reviewed by Judge Finch in the opinion delivered by him in Hillyer v. Vandewater, 31 N. Y. St. Repr. 671, that a reference to that case is all that is necessary here, although his application of the law as expounded by him to the facts of the case before the Court of Appeals did not meet with the full concurrence of a majority of the court, as appears from the official report of the case in 121 N. Y. 681.

In this connection and especially as the statute relating to personal property, after forbidding the suspension of the absolute ownership by any limitation or condition for more than two lives, also provides that in all other respects limitations of future or contingent interests in personal property shall be subject to the rules prescribed in relation to future estates in real property, it may be well to refer to the Revisers' Note on 1 R. S., § 14 of art. I of title II, relating to the creation and division of estates in real property and the alienation thereof. They said with reference to the future estates therein mentioned:

"To prevent a possible difficulty in the mind of those to whom the subject is not familiar, we may also add that an estate is never inalienable unless there is a contingent remainder and the contingency has not yet occurred. This is the meaning of the rule of law prohibiting perpetuities and is the effect of the definition in section 14."

This was the intention and the opinion of the revisers, and the Court of Appeals has in the main adopted the same rule of interpretation. See Radley v. Kuhn, 97 N. Y., at p. 35.

It thus appears that, under the authorities referred to, the ulterior limitation over, contained in the trust created by the third paragraph of the will, may be cut off and then the remaining part of the trust sustained on the theory of an immediate vesting.

I have, therefore, come to the conclusion, after a careful examination of the will as a whole and the circumstances surrounding its execution, that the said ulterior limitation over should be cut off and that it should be held that the estate created by the testator by the third paragraph of his will vested upon his death in the four children then living of Harrison and Josephine Clark, subject to the life interests of their parents, and subject to be defeated as to any such child by death without issue during the running of the life estates.

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What has been hereinbefore said in relation to the trust created by the third paragraph of the will is equally applicable to the ulterior limitation over contained in the trust created for the benefit of the testator's grandson, Harrison Clark, Jr., by the second paragraph of the will. Such limitation being found in the third paragraph of the will in the following language:

"In the event of the death of my grandson, Harrison, before he shall have attained the age of thirty years, I direct that the bequest hereinbefore made to him shall be added to the trust fund provided for my son Harrison and his said wife and family, to become a part thereof and to be managed by them, my said trustees, in the same manner as they are directed to manage the specific bequest herein made to them for the use of my said son and his said wife and family."

This limitation is for three lives in being, to-wit, Harrison Clark, Jr., Josephine Clark and Harrison Clark, and is void.

Under the authorities, this limitation can be cut off and the provision for the grandson becomes a direct gift, with postponement of actual delivery to him until he shall attain the age of thirty years.

The testator uses strong words of gift *in presenti*. He says:

"I give and bequeath to my grandson, Harrison Clark, the sum of $20,000."

These words should be considered as establishing a direct legacy which, in itself, is absolute and which is followed by an invalid condition subsequent, divesting the legacy. The rule is that a direct gift, in words which standing alone would vest a good title, when followed by an unlawful condition subsequent, is valid, notwithstanding the declared illegality of the condition. It is only where the unlawful condition is a condition precedent, that the subsequent estate does not take effect. See Oxley v. Lane, 35 N. Y. 340; Lovett v. Gillender, id. 617.

The trust created for the benefit of the said grandson should, therefore, be construed in conformity with the views expressed by me. The consequence is that, if he attains the age of thirty years, then the fund is to be delivered to him under the terms of the will. If, however, Harrison Clark, Jr., should die before attaining that age, the principal sum will go to his heirs.

In the second paragraph of the will the trustees are directed to invest the $20,000 trust fund in first mortgage notes secured on real estate in the city of Chicago, state of Illinois. The trustees

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ask the instructions of the court as to the binding character of this direction. They evidently believe they have a right to disregard it. In this, I cannot agree with them. True, as a general rule, investments by executors or testamentary trustees of the funds in their hands, which take those funds beyond the jurisdiction of the court, will not be sustained, but, as was held in Ormiston v. Olcott, 84 N. Y. 339, the rule is not so rigid as to admit of no possible exceptions and moreover relates only to voluntary investments by a trustee having the fund in his hands and full opportunity and freedom of choice. In the case at bar, the testator directed the investment in first mortgage bonds secured on real estate in the city of Chicago, and the direction is mandatory as long as compliance with it remains feasible.

The trustees also ask the instructions of the court as to their powers under the third paragraph of the will which provides that they shall invest the trust fund therein referred to in first mortgage notes, or other first-class securities which will bear as high rate of interest as said trustees shall deem consistent with the safety of the investment. In exercising their powers in that respect, the trustees are bound to see to it.

1. That the securities are first-class, and
2. That they are safe.

After that has been done, the further duty arises to make due discrimination between the securities falling within the description with the view of selecting such as bear the highest rate of interest. And the selection should be made with reference to the law of this state as to the class of securities in which trustees are justified to invest. Prior to 1889 the leading case upon that point was King v. Talbot, 40 N. Y. 76. In 1889, it was provided by chapter 65 of the laws of said year that it shall be lawful for executors, administrators, guardians and trustees and others holding trust funds for investment, to invest the funds so held by them in trust, in bonds or stocks of any of the cities of this state, issued pursuant to the authority of any law of this state.

By the third paragraph of the will, the trustees are directed to pay to Josephine, the wife of the testator's son Harrison Clark, a portion of the income of the trust fund to be determined by them for the use of herself and children. After such determination and the payment thereunder of the amount to Mrs. Josephine Clark, their responsibility ceases and they are not charged with the duty of supervising her expenditure of the same.

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And finally the trustees ask the court to decide upon the language of the will, whether their discretion in determining how much of the income of the trust fund shall be paid to the testator's son Harrison, or how much to his wife for the use of herself and children, is subject to control by the court. The language of the will is found in the second subdivision of the third paragraph, and is as follows:

"To pay semi-annually so much of the income derived from such investment as they may think necessary for the comfortable support of my son Harrison, they keeping in view the necessities of his wife and children, and the remainder of such income, semi-annually to Josephine, wife of my said son Harrison, for the use of herself and children. In thus providing for the support of my said son Harrison and his wife and children, I intend to and do give to my said trustees, large discretion, as to how they shall divide such income, desiring that they should act with reference thereto, as they think I would act, if living."

There can be no doubt that however large the discretion of trustees may be in the exercise and execution of their trusts, the court never loses its power to review the use of this discretion, and if need be, to correct any abuse in its exercise. Ireland v. Ireland, 84 N. Y. 321, at p. 325; Holden v. Strong, 116 id. 471, at p. 474; Perry on Trusts, § 511; Collister v. Fassit, 7 App. Div. 20; Bound v. T. C. R. R. Co., 50 Fed. Repr. 854; Banning v. Gunn, 4 Dem. 337, at p. 339; Mason v. Mason, 4 Sandf. Ch. 623; Bryan v. Knickerbacker, 1 Barb. Ch. 409; Forman v. Whitney, 2 Keyes, 165; Wormley v. Wormley, 8 Wheat. (U. S.) 421, at p. 442; Hancox v. Wall, 28 Hun, 214.

In Ireland v. Ireland, 84 N. Y. 321, Earl J., says on page 326, *et seq.*:

"A court of equity, by virtue of its general jurisdiction over trusts and trustees, can, upon a proper state of facts, direct how their discretion shall be exercised; *in other words, how the trust fund shall be administered.*" *In this case the court directed the division of the income among the beneficiaries in equal proportions.*

In Holden v. Strong, 116 N. Y. 471, the action was brought to procure a judicial construction of the will of Heman Holden, deceased, the father of the plaintiff, and to procure a decree giving directions to Charles D. Strong, the executor and trustee, as to the amount he should pay over annually to the plaintiffs." The trial

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court found as facts that Heman Holden died * * * leaving a last will * * * and gave to such trustee the residue and remainder of his estate, in trust for the plaintiff during his natural life, directing that the estate should be converted into money and invested; * * * and gave to such trustee *full power and authority to use so much of the trust fund, either interest or principal, as shall, in his judgment and discretion, be necessary for the proper care, comfort and maintenance of the plaintiff.*"

The similarity of this case to the one under consideration is marked — they are both brought for the construction of a will — and the court, in both, is asked to give its direction to the trustees as to how they shall exercise the discretion vested in them by the respective testators, and while on a technicality, in the case of Holden v. Strong, the court did not decide this latter matter, Haight, J., says on page 474, bottom of page and page 475:

"We wish to state for the future guidance and conduct of the trustee, that we are not entirely satisfied with the manner in which he has discharged the duties of his trust. * * * We fully agree with the trial court in its construction of the will, that the plaintiff is entitled to his support and maintenance according to his condition in life.

"As long as the plaintiff remains rational, prudent, industrious and saving, there can be no abuse of discretion in allowing him to take the annual or semi-annual appropriations to expend for his own comfort and maintenance in his own way and in the gratification of his own choice."

In Bryan v. Knickerbacker, 1 Barb. Ch. 409, Ruggles, V. C., says on pages 411, 412:

"The exercise of a discretion by a trustee is subject to the regulation and control of the court, so far at least as to prevent its abuse. The discretion must be reasonable."

In Forman v. Whitney, 2 Keyes, 165, the will contained the following provision: "I give and bequeath to my wife during her natural life, the interest of $3,000, or *so much of said interest as my executors may deem necessary for her comfort.*"

The court held that the discretion vested in the executors was not absolute, but must be exercised reasonably; and Davis, J., says on page 168:

"The comfort for which the testator provided was not bounded by a mere *quantum sufficit* to eat, to drink and to wear. * * * The word embraces whatever is requisite to give security from want,

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and furnish reasonable physical, mental and spiritual enjoyment; * * * In short to possess those nameless currents of enjoyment which take their rise in the assurance of money in the pocket and more to come."

Relying upon these authorities, the defendant Harrison Clark asks the court to direct the trustees to pay to him one-quarter of the net income of the trust fund established for the benefit of himself and his family. None of the parties objects to it and the briefs submitted by counsel for Josephine Clark states that so far as she has the right to do so on her individual behalf, she makes no objection to such an order, but that she is advised that she has no authority to give a consent which shall in any way affect the rights of her minor children.

The testator speaks of the "comfortable support" of his son and of the "necessities" of his wife and children, a distinction which fairly belongs to a proper consideration of the matter which the testator has put in the charge of the trustees. So while it is true that the will of the testator is to be construed in the light of the circumstances surrounding the estate and the beneficiaries at the time it was made, it is equally true that the application and distribution of the income should be made in view of the circumstances as they now exist.

It appears that the trust fund under consideration amounts to over $100,000, and that its net income will be about $5,000. One-quarter of this income would not be an excessive allowance for the "comfortable support" of Harrison Clark, and, under the circumstances so far as they have been disclosed, would even have to be considered as a fair and reasonable allowance. Consequently, if the trustees should see fit to pay to him one-quarter of the said income and the remaining three-quarters to his wife for the benefit of herself and children, the court would have no objection to it. Nevertheless I am unwilling to make an absolute order to that effect. There evidently were family reasons which do not as yet fully appear, which induced the testator to make the provision in the form he made it and to give to the trustees large discretion as to the division of said income and to express to them his desire to act in the matter as they might think he would act, if living. I shall, therefore, content myself with the foregoing simple expression of my views and leave the trustees free to act thereunder according to their own conscience. The decree to be entered in this case should reserve, however, to Harrison Clark the right to

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specially apply at any time to the court for modification upon proof that the trustees arbitrarily and without sufficient reason withhold from him a part of the said income which under all the circumstances he should in all fairness receive.

Let a decree be presented for settlement in accordance with this opinion.

Ordered accordingly.

THE ATLANTIC TRUST CO., as Trustee, Etc., of ELIZABETH W. WHITLOCK, Deceased, Plaintiff, *v.* WILSON M. POWELL et al., as Executors, Etc., of BENJAMIN M. WHITE, Deceased, Defendants.

(Supreme Court, New York Special Term, April, 1898.)

1. **Trustees — Not charged with proper investments which result unprofitably through a general depression.**

Where a trustee loans, in good faith, trust funds on mortgages upon property to the extent of only two-thirds of its value and the investment thereafter pays six per cent. interest for several years, his estate will not at the instance of his successor, be charged with the investments, merely because the lands themselves, the same having been bid in upon sales had upon the foreclosure of the mortgages, have, since the death of the trustee, produced no income, it appearing that during all this period there has been a depression in the real estate market which has made it difficult to either rent or sell at fair prices.

2. **Same — Counterclaims — Advances of income, commissions on income, payments, etc.**

Counterclaims for advances of income made to the beneficiaries by the deceased trustee and for commissions on income, not claimed by him in a brief account rendered to them, cannot be maintained. The estate of the trustee is, however entitled to be allowed half commissions on the principal and also to reimbursements for payments which he made on the foreclosure of the mortgages for the expenses thereof, taxes, water rates and insurance, together with interest thereon.

ACTION to make the estate of an executor and trustee responsible for losses alleged to have been sustained in consequence of certain investments.

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Hand, Bonney, Pell & Jones (C. A. Hand, of counsel), for plaintiff.

John M. Scribner, for defendants.

FREEDMAN, J. The plaintiff by this action seeks to make the estate of Benjamin M. White, deceased, responsible for losses alleged to have been sustained by the estate of Elizabeth W. Whitlock, deceased, in consequence of certain investments made by the said Benjamin M. White, while acting as executor and trustee under the will of his sister, the said Elizabeth W. Whitlock.

The said Benjamin M. White died February 1, 1894, and in April, 1894, the defendant Wilson M. Powell was, by an order of this court, appointed trustee in his place. Mr. Powell resigned as such trustee, and by a further order of this court, dated November 2, 1895, the plaintiff was appointed trustee in his stead under the will of Elizabeth W. Whitlock, deceased.

Benjamin M. White, by his own last will and testament, made the defendants Powell, Willits and Rider executors of his estate.

The trust funds which came into the hands of Benjamin M. White in the year 1883, when he became sole surviving trustee of the estate of his sister Elizabeth W. Whitlock, amounted altogether to $31,000.

The plaintiff on its appointment as trustee received from the defendant Wilson M. Powell, the resigning trustee, certain assets then composing the trust estate, as follows:

1. Bond and mortgage made by Frances J. Annam and her husband	$5,500
2. Bond of Mary J. Bolton (one of the defendants) and her husband	1,000
3. Note of B. M. White, dated November 1, 1892	500
4. Deed of Nos. 26 and 28 Chapel street, Brooklyn, premises purchased by B. M. White, trustee, on foreclosure of mortgage	18,000
5. Deed of No. 73 Furman street, Brooklyn, title to which was also acquired by mortgage foreclosure,	6,600

As to the bond and mortgage made by Frances J. Annam and her husband it is conceded that they are good security for the

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money loaned and that the interest on them has been regularly paid.

The loan on the bond of Mary J. Bolton and her husband was not made by the trustee, but by the testatrix herself, and all claim on account thereof was withdrawn by plaintiff's counsel on the trial.

The note for $500, made by White individually to himself as trustee, is admitted to be chargeable against the defendants, and the only question as to it, is whether it is not to be set off against the amount established by the defendants as a counterclaim. This will be considered later on.

The only remaining claims of the plaintiff relate to the investment of $18,000, in the premises 26 and 28 Chapel street, and of $6,000, in the premises 73 Furman street.

As to the premises 26 and 28 Chapel street the investment was originally made by loans on mortgage, viz.: a mortgage dated February 28, 1888, for $13,000, and a mortgage dated May 29, 1890, for $5,000. These mortgages were foreclosed and the trustee was compelled to bid in the property. He received therefor a sheriff's deed, dated December 5, 1892, and took title to himself as sole surviving executor, etc., of Elizabeth W. Whitlock, the consideration expressed in the deed being $18,000, the aggregate principal sum secured by the two mortgages foreclosed.

As to the premises 73 Furman street, the investment originated in a loan of $6,000, in December, 1883. This mortgage was foreclosed and the loan renewed to the purchaser upon the sale. The second mortgage was foreclosed and the loan renewed to a new purchaser upon the sale. The third mortgage was in process of foreclosure at the time of Mr. White's death. Thereafter the foreclosure was completed and the property bid in at the sale for the benefit of the trust estate for the expressed consideration of $6,600. From 1883 down to the time of the foreclosure of the last mortgage 6 per cent. interest was realized on the investment.

It is claimed that these investments of $18,000 and $6,000 respectively were not made by Mr. White, with the care or prudence incumbent upon him as trustee; but, on the contrary, the same were negligently made, and the securities taken for these loans were inadequate; that the investments so made by Mr. White, as trustee, were improvident and disastrous, and have so resulted that no income whatever has been realized by the beneficiaries under Mrs. Whitlock's will for the entire period between the date of

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White's decease and the appointment of the plaintiff as trustee, and the plaintiff charges that substantial realization of the same by plaintiff of the assets turned over to it is precarious and doubtful.

But it is not claimed that Mr. White was guilty of any dishonesty or bad faith.

The question, therefore, is whether he acted with reasonable prudence in making the loans.

The evidence shows that he invested his dead sister's money on like security, as he did his own money and his living sister's money. He was, doubtless, actuated by a desire to secure for the children of his deceased sister, his own nieces, who are the beneficiaries named in the fourth clause of the will of Elizabeth W. Whitlock, the best possible income consistent with safety of the principal, and the loans secured by the mortgages in question bore 6 per cent. interest, which Mr. White regularly paid to said nieces down to the time of his death. That Mr. White himself believed the property to be valuable, and the security good, is shown by the fact that he continued to pay to the said beneficiaries interest out of his own funds after the foreclosures, just as if the mortgages were still existing. He, no doubt, expected to reimburse himself out of future rents, or from the proceeds of subsequent sales. He bought in the property on foreclosure to prevent any loss to the estate he represented, and that he acted with good judgment in the matter of such purchases is shown by the testimony of the expert witnesses called by the defendants.

The weight of the evidence is that, at the time the loans were originally made, the Chapel street and Furnam street premises were adequate security, even if it be held that it was the duty of Mr. White to loan no more upon them than about two-thirds of their respective values; that, since that time, their values have become depreciated by reason of changes in the neighborhood over which Mr. White had no control; that Mr. White since that time did the best he could do under adverse circumstances; that at the time of his death in February, 1894, the premises were still worth substantially all they had cost; and that since his death, owing to the depressed condition in the market, such a depreciation has occurred in nearly all Brooklyn property as to make it difficult to derive a suitable income from the premises in suit.

Now, Mr. White's estate clearly cannot be held for the effects of the general depreciation which occurred after his death, and up to the time of his death he appears to have done all he could

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do, provided the loans, when originally made, constituted proper investments, and as to that the weight of the evidence is that they were.

The result may, therefore, be an unfortunate one to the beneficiaries under the will of Mrs. Whitlock, but under the circumstances of this case the estate of Mr. White should not be held liable on the theory that the investments were originally improper. The law does not require infallibility of any trustee.

The rule is that a trustee will not be held responsible for any losses in the management of the trust property, so long as he acted in good faith, in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own property. 2 Story Eq. 154, § 1272.

"If a more stringent rule be applied as to the responsibility of trustees, the trust would defeat itself by deterring thoughtful, honest and prudent men from engaging in the discharge of duties so hazardous and so burdensome; when one has faithfully endeavored to execute a trust, it would be both unreasonable and inequitable to make him an insurer against losses from casualties and misfortunes, which ordinary sagacity could not prevent." Roosevelt v. Roosevelt, 6 Abb. N. C. 447, 453. Substantially to the same effect are, Ormiston v. Olcott, 84 N. Y. 339 (347); Crabb v. Young, 92 id. 56; Higgins v. Whitson, 20 Barb. 141 (146); Scott v. Depeyster, 1 Edw. Ch. 513 (534-535); Thompson v. Brown, 4 Johns. Ch. 619 (628-629).

The law being as stated the evidence is clearly insufficient to hold the estate of Mr. White liable.

The questions still remaining relate to the counterclaims of the defendants.

Advances made by Mr. White to the beneficiaries under Mrs. Whitlock's will, on account of income, are not recoverable from the plaintiff or its trust.

There is no proof to sustain the counterclaim for commissions on income. In his dealings with the beneficiaries under Mrs. Whitlock's will up to the very last, Mr. White rendered to them no detailed account, but he sent them a brief statement showing that he was paying to them what he considered their due as a finality.

The counterclaim for half commissions on the principal of the estate should be sustained. To that the defendant trustees are clearly entitled.

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It also appears that, after the mortgages on 26 and 28 Chapel street were foreclosed, and the property bought in for the benefit of the trust estate, Mr. White paid $1,413.72 for taxes, water rents and expenses of foreclosure and the additional sum of $16 for insurance on said premises. These amounts should be allowed with interest.

With the exception of the foregoing items expressly allowed, the counterclaims should be disallowed, and the amount due on the note of $500, hereinbefore referred to, may be set off against the amounts due on the counterclaims sustained.

Ordered accordingly.

THE PEOPLE ex rel. FRANK K. BOWERS, Relator, *v.* WILLIAM DALTON, as Commissioner of Water Supply of The City of New York, Respondent.

(Supreme Court, New York Special Term, April, 1898.)

Charter of New York — Status of commissioner of water supply — Power to discharge peremptorily.

The charter of the city of New York (Laws of 1897, chap. 378, §§ 1536, 1543) empowers the commissioner of water supply, as "head" of a department, to remove, at pleasure, a foreman of repairs, transferred from a similar position in the department of public works as it existed under the old charter, who is not protected in his position by the Civil Service and Veteran Acts.

APPLICATION requiring respondent to show cause why a peremptory writ of mandamus should not issue against him, or if mandamus be not allowed by the court, why an order should not be entered herein, allowing a writ of certiorari to review the determination of respondent in dismissing the relator from service.

W. R. Spooner, for relator.

John Whalen, Corporation Counsel (Terence Farley, of counsel), for respondent.

FREEDMAN, J. This is an application requiring the respondent to show cause why a peremptory writ of mandamus should not issue against him, commanding him to reinstate the relator as foreman,

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Company 6, in the department of water supply; or, if mandamus be not allowed by the court, why an order should not be entered herein, allowing the issuance of a writ of certiorari to review the determination of the respondent in dismissing the relator from service.

Briefly stated, the facts alleged in the petition are, that on or about the 27th day of May, 1896, the relator was appointed foreman of repairs, Company 6, in the bureau of chief engineer, Croton aqueduct, department of public works, in the municipal corporation then known as the Mayor, Aldermen and Commonalty of the City of New York, at the rate of $5 per day as foreman, and $2.25 per day for horse and wagon, which said appointment took effect June 1, 1896; that pursuant to section 1536 of the new charter of 1897, the mayors of the various cities met and adopted a detailed plan, which provided for the apportionment between the several public departments, bureaus and offices, and the assignment to service in said public departments, bureaus and offices, respectively, of subordinates and employees, in the several branches of the public service in each of the several municipal and public corporations constituted by the charter, which said plan received the approval of the mayor of the city of New York, as to persons in the service of the mayor, aldermen and commonalty of the city of New York, and that said plan was subsequently published in the City Record on January 14, 1898; that in and by said plan, all foremen in the bureau of the chief engineer of the department of public works of the city of New York were assigned to the same positions in the department of water supply in the city, as constituted by the new charter, and that by reason of said apportionment, relator was assigned to perform the same services in the same part of the city, to-wit, at Fordham, in the borough of the Bronx, and to hold the same relative rank or position in the city constituted by the new charter, as he performed and held at the time said plan of apportionment and assignment was determined upon; that on or about the 4th day of January, 1898, the respondent discharged the relator from his position as foreman, without any charges being preferred against the relator, or without any hearing being accorded him or an opportunity to make an explanation and without cause being assigned therefor, and without any cause whatsoever; that the relator protested against said action of the respondent, and made a written demand upon him, which demand was dated the 7th day of January, 1898, to be reinstated

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to the position from which he has been removed, on the ground that "such discharge is in violation of the provisions of the Constitution of this state, the laws of this state, and the Civil Service Rules and Regulations;" and that notwithstanding said demand the respondent has failed and neglected to reinstate the relator.

Upon the return of the order to show cause the respondent did not deny any of the allegations of the petition or moving papers, and, consequently, all of said allegations must be taken as true. It may also be assumed, as claimed by the relator, that at the time of his appointment the office to which he was appointed, was in the classified service under the rules and regulations of the civil service.

But it does not appear from either the petition or any of the moving papers that the relator is an honorably-discharged soldier or sailor of the late war of the rebellion, or that he is an honorably-discharged volunteer fireman, or that he is a regular clerk or head of a bureau, in any of the departments of the municipality known as The City of New York.

Having failed to bring himself within any of the classes thus excepted, I cannot perceive how the rules and regulations of the Civil Service Act protect him.

Regulation 44 of the Civil Service Rules and Regulations (page 36 of the Thirteenth Annual Report of the New York City Civil Service Commission for the year 1897) provides as follows:

"Subject only to the qualifications required to be ascertained in accordance with these regulations, the power of appointment and the responsibility of selection are in all cases in the appointing officer. *The power of any officer to remove is not impaired by anything contained in these regulations.*"

Besides, it has been expressly adjudicated that the Civil Service Laws, where no statutory restriction exists, do not prevent the head of a department from removing a subordinate at his pleasure. Heard v. Commissioners of Charities of the City of New York; People ex rel. Higgins v. Grant, 37 N. Y. St. Repr. 629.

The Constitution certainly affords no redress to the relator, as it has been held, citing the constitutional provision, that where the power of appointment is conferred in general terms, and without restriction, the power of removal, in the discretion and at the will of an appointing power, is implied and always exists, unless restricted and limited by some provision of law. Constitution, art. X, § 3; People ex rel. Cahill v. Barker, 5 App. Div. 227; affirmed, 150 N. Y. 570; People ex rel. Cline v. Robb, 126 N. Y. 180.

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As neither the Constitution nor the Civil Service or Veteran Acts protect the relator, the merits of his claim depend entirely upon the provisions of the new charter. Sections 1536 and 1543 of that instrument are the only ones requiring consideration here. Section 1541 has been referred to several times in the brief of the relator, but on turning to it it will be found that it relates in no way or manner to the question now presented.

Section 1536, which relates to the retention of office by clerks in the public employ in the territory consolidated, first, provides that all the clerical and other subordinate forces, including janitors of public schools, not subject to removal without cause, * * * shall continue to hold their respective positions without prejudice or advantage * * * except that the clerks and subordinates of departments that are abolished or reconstructed by this act, under the same or under other names, shall continue in the service of the said city under the jurisdiction of the appropriate department, subject, nevertheless, to removal in accordance with the provisions of this act for cause, or to abolish unnecessary positions. Under this provision it is claimed by the relator that his removal was illegal, because made without cause, and not for the purpose of abolishing an unnecessary position. But the difficulty with this contention is that the provision applies only to employees who, before the consolidation, could be removed only for cause. These were continued in office, subject to be transferred, and protected by the provision that thereafter they should not be liable to be removed, except for cause or whenever it was necessary to abolish an unnecessary position. The relator does not belong to this class.

Moreover, section 1536 further provides as follows:

"*The head of every department, and every other officer by this act given power to appoint, remove* and fix and regulate the salaries of his subordinates, appointees and employees, shall have power upon assuming office, or at any time thereafter, to remove any person assigned to service under him by said plan, and to fix and regulate, within the limits of his appropriation and subject to the restrictions, if any, hereinbefore prescribed, the salaries and compensation of his said subordinates, appointees and employees."

This provision confers upon the head of every department and every other officer having power to appoint, the power of removing at pleasure every subordinate, appointee or employee whose term of

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employment is not specially protected by some other statutory provision. As to all such unprotected subordinates, appointees and employees the appointing power seems to possess unrestricted power of removal, although in making appointments the mode of selection has been left surrounded by prescribed statutory safeguards and rules promulgated in conformity therewith. With the restrictions under which appointments must be made, I have nothing to do in this case.

The further contention of the relator that the provision last referred to as contained in section 1536 does not apply to the commissioner of water supply, because no power of appointment has been conferred upon him, is clearly untenable for the reason that by section 1543 the power is given to the heads of all departments to appoint and remove all * * * clerks, officers, employes and subordinates in their respective departments, except as otherwise specially provided, without reference to the tenure of office of any existing appointee.

The same section then goes on and says:

"But no regular clerk or head of a bureau shall be removed until he has been allowed an opportunity of making an explanation."

Here, again, the relator is not within the exception.

That the commissioner of water supply is the head of a department within the meaning of section 1543 may be seen by reference to section 468, which provides that the head of the department of water supply shall be called the commissioner of water supply.

Inasmuch, therefore, as the relator did not stand protected by some special provision or rule of law, it was competent for the commissioner of water supply to remove him without any cause whatever, and without abolishing the position held by him as an unnecessary one.

At least such was the case at the time of the removal and at the time of the hearing of the application for a mandamus.

Any subsequent change in the law cannot be considered now.

For the foregoing consideration the application of the relator for a peremptory writ of mandamus must be denied, with costs. The question involved having been disposed of as a question of law, the application for a writ of certiorari must be denied as unnecessary.

Ordered accordingly.

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EDWARD N. WHITON, Plaintiff, v. THE MORNING JOURNAL ASSOCIATION, Defendant.

(Supreme Court, New York Special Term, April, 1898.)

Publication of summons — Filing papers on order.

Before the summons can be published against a domestic corporation, the summons, complaint, order of publication and affidavits must have been duly filed (Code of Civil Procedure, § 442), and, where the order alone has been filed before publication, all proceedings under it must be set aside.

MOTION by defendant to set aside an order directing service of the summons and complaint by publication.

Einstein & Townsend, for motion.

P. V. R. Van Wyck, opposed.

FREEDMAN, J. The action is for libel. It, therefore, had to be commenced within two years. Code of Civil Procedure, § 384. Upon the publication of the libel set forth in the complaint the statute would have fully run on December 23, 1897, if an attempt had not been made to commence the action, as provided by section 399 and subdivision 6 of section 438 of the Code of Civil Procedure, by a delivery of the summons to the sheriff on December 22, 1897. That gave the plaintiff sixty days additional time. The sixty days expired February 21, 1898, which, consequently, was the last day upon which to begin publication of the summons so as to keep within the Statute of Limitations. The plaintiff on that day procured an order of publication, and the first publication took place on the evening of the same day in the "Evening Post." In the "New York Law Journal" the first publication was made two days later. Without stopping to consider whether that was sufficient, the objection still remains that the summons and complaint and order of publication and affidavits in support of the order were not filed until February 28, 1898. This objection is fatal, for, under section 442, those papers should have been filed with the clerk on or before the day of first publication. That provision is mandatory

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and had to be complied with to confer jurisdiction. The failure to do so is not a mere irregularity within the meaning of rule 37 of the General Rules of Practice. Section 437 of the Code does not help the plaintiff, because it refers to substituted service.

For the foregoing considerations the motion of the defendant to set aside the order of February 21, 1898, directing service by publication, because the obtaining of the order was not followed up by the filing of the necessary papers on the same day, should not be granted in its entirety. The order was regularly obtained. But all proceedings taken by the plaintiff under it are of no effect because the papers were not filed in time. The defendant may, therefore, have an order setting aside plaintiff's proceedings, under the order of February 21, 1898.

Ordered accordingly.

Matter of the Accounting of MEYER M. FRIEND, as Assignee of HERMAN BENDIX, for the Benefit of Creditors.

(Supreme Court, New York Special Term, April, 1898.)

1. **Assignee for benefit of creditors — Allowance of counsel fees.**

A general assignee will not be allowed counsel fees incurred for preparing schedules or for general advice and consultations, but where complicated questions arise, he is entitled to the services of counsel.

2. **Same — Right of creditors to examine him as to assets claimed by him personally.**

Where a general assignee, himself an attorney, seeks to withhold a sum of $350 paid him for professional services, as he testified, twelve days prior to the execution and delivery of the assignment and with knowledge that it was contemplated, objecting creditors should be permitted to show by the assignee that he never rendered any services for the sum in question.

MOTION to confirm the report of a referee, upon an accounting by an assignee under a general assignment for the benefit of creditors.

The material facts are stated in the opinion.

Julius J. Frank, for assignee.

Samuel Hoff, for creditors.

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GIEGERICH, J. The first question presented by the exception to the report of the referee, taken by the objecting creditors, relates to the allowance of a counsel fee of $500 paid by the assignee (who is an attorney-at-law) to his counsel. An assignee for the benefit of creditors will not be allowed counsel fees paid for preparing schedules, or for general advice and consultations. Levy's Accounting, 1 Abb. N. C. 182; Matter of Gomprecht, 13 Daly, 481; affirmed, 102 N. Y. 741; Matter of Ludeke, 22 Misc. Rep. 676. In Levy's Accounting, *supra*, Judge Robinson, in passing upon this question, at p. 182, said: "In the ordinary performance of such duties, as an assignee for the benefit of creditors assumes, he at best engages for his own personal competency to perform them, and he cannot involve the estate in the expense of employing counsel to advise him as to duties he has thus assumed, unless it were shown that some unusual complications existed which rendered it reasonable and proper that professional advice should be called in to extricate or alleviate the affairs of the assigned estate from some anticipated complications. No such convenient rule exists as enables an assignee, at the expense of the estate, to retain a lawyer, as one among other employees that he may necessarily employ, for the purpose of affording him general advice as to his conduct, in his office as trustee. The special exigency and reasonable necessity for the incurring of any such expense in the execution of the trust must in all cases be shown." And in the Matter of Johnson, 10 Daly, 123, 126, Chief Judge Charles P. Daly said: "The court will recognize that the services of a lawyer are necessary in drawing the formal papers that have to be presented to the court in the different stages of the proceedings, as they must be carefully prepared to comply with the provisions of the statute regulating voluntary assignments, and with the rules of the court. They are, in most cases, mere formal papers which do not require either much labor or any great professional skill in their preparation, involving little else than a due observance of the provisions of the statute and the rules of the court." There was but one action brought against the assignee, and that was withdrawn. During the administration of the assigned estate questions arose which, to my mind, were complicated and justified the employment of counsel. Among these were: The claim of creditors for the value of merchandise which had passed to the assignee under the assignment; the continuance of the business formerly conducted by the assignor; the

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claim of one Joseph Liebman, to apply the indebtedness due him in payment of the purchase price of goods bought at the assignee's sale; and the contention of the Columbia Bank respecting such sale. For the services so rendered, including those performed in the suit which was discontinued, and for drawing formal papers, I think $250 is ample compensation, and hence the allowance of $500 should be reduced to said sum, and, as modified, the referee's report as to these matters is confirmed. This does not include the services of counsel upon the accounting. For these a supplemental account may be filed (Matter of Ludeke, *supra*), and the matter may be referred back to the referee for the purpose of receiving and passing upon the same. The attention of counsel is directed to the Matter of Rauth, 10 Daly, 52, regarding the practice as to the allowance of costs upon an assignee's accounting. As to the $350 sought to be charged against the assignee, he testified that he received the same for professional services twelve days prior to the execution and delivery of the assignment, and with knowledge that the assignor was financially embarrassed, and then contemplated the making of an assignment for the benefit of his creditors. The assignor, however, testified that no services whatever had theretofore been rendered by the assignee for him; that such sum was paid pursuant to an understanding had between them, that the assignor's family was to have the benefit of it; and that in or about November, 1897, the assignee offered said sum to the assignor, but withdrew the offer. It is true that such alleged agreement and the offer to return the money were denied by the assignee; yet, his recollection respecting the time of the rendition of the services was very indistinct upon cross-examination, as appears by the following questions and answers: "Q. What period of time did these legal services cover? A. I cannot say, now, Q. Do you know? A. Some time previous to the time of the rendering of the bill. Q. How long previous? A. Covering some considerable time. Q. Well, how long? A. It may have been a year, or two years. Q. Can you give me a statement of the services for which the charge was made? A. I cannot just now. Q. Can you at the next session?" The last question was objected to by counsel for the assignee, and the referee, in sustaining the objection, said: "I think it would lead to an interminable inquiry if that line of thought were pursued, and I am obliged to stop you somewhere." At the succeeding session the assignee was interrogated upon the

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same subject, as follows: "Q. Mr. Friend, are you prepared to testify as to the services you rendered to Mr. Bendix, the assignor in this case, for which you claim to have been paid $350?" This was objected to by the assignee's counsel, the objection was sustained and the objecting creditor's counsel noted an exception. This ruling, in my opinion, was error. The object of these questions, as stated by counsel for the objecting creditors, was to show that no services whatever were rendered by the assignee for the assignor for said sum, and, had he succeeded, it is apparent that the referee would have been compelled to arrive at a conclusion different from the one he did upon this subject. The matter is, therefore, referred back to the referee for the purpose of enabling the objecting creditors to cross-examine the assignee respecting the services for which he seeks to retain said sum of $350. The exception taken to the referee's refusal to charge the assignee with one-half of the statutory commissions should, in my judgment, be overruled. The counsel for the objecting creditors is in error as to the statement contained in his brief that the referee refused to allow evidence of an agreement whereby the assignee agreed to accept only one-half of the statutory commissions. While it is true that such testimony was at first excluded, it nevertheless was admitted later on. The testimony of the assignor regarding such alleged agreement was contradicted by the assignee, and there was sufficient evidence to support a finding either way upon this subject. But it was the function of the referee to determine this question of fact, and, having found for the assignee, his conclusion should not be disturbed. Besides, such an agreement would be valid only as between the assignor and assignee, while it would be invalid so far as it affected the interests of the creditors. In the Matter of Hulburt, 89 N. Y. 259, 263. Order to be settled on notice.

Ordered accordingly.

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VALDEMAR HANSCHELL, Plaintiff, *v.* JOHN SWAN, Defendant.

(Supreme Court, New York Trial Term, April, 1898.)

1. Shipping — Master's draft pledging his "owners" — Law governing the construction of the contract — Liability of a fractional owner of the vessel — Dingley Act — Advances unnecessary to the vessel — Liability of an executor as joint tenant of the estate of his testator.

In an action brought on a master's draft, it appeared that the defendant, a resident of the state of New York, was one of three executors who, in the right of their testator, owned one thirty-second of an American brig. After the death of the testator, the defendant, a shipping merchant, consigned the brig to the plaintiff, a merchant of Barbadoes, W. I. The draft pledged the "vessel, her freight and owners," and was payable ten days after the vessel arrived at her port of discharge in Europe. It was given by the master, in part at least, for advances not necessary to the brig, and which the plaintiff made without investigation as to their necessity. Before the time for the payment of the draft had arrived, the brig was sold in her foreign port of discharge for moneys raised on bottomry, she having, while on her voyage across the Atlantic, put into Bermuda in distress. Upon the trial of the action, the question, whether the sale of the brig did not determine all liability upon the draft, was not raised nor decided. The complaint charged the defendant individually as an "owner," and this allegation was denied. The allegation of individual ownership was not proved, but the defendant did not move to dismiss the complaint, because of a variance between the complaint and the proof. The Dingley Act of June 26, 1884 (Supp. R. S., U. S., vol. 1, p. 443, § 18), provides: "That the individual liability of a ship owner, shall be limited to the proportion of any or all debts or liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending." The defendant did not show the value of the brig nor that of his interest in it, or show whether or not there were other claims against it.

Held, that as the power of the master, while in a foreign port, to bind his owners personally could only arise from their express instructions or be implied from the law of the country of the brig and her owners, the contract was to be construed according to the law of New

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York, as affected by the Dingley Act, and not by the law of Barbadoes, a British possession, where the common law made a part owner liable, *in solido*, for debts lawfully contracted by the master.

That, under the Dingley Act, the plaintiff was entitled to recover of the defendant to the extent only of those advances which were actually necessary to the brig, and could recover these upon the basis only of one thirty-second of the vessel, that being the proportion of all her proven debts or liabilities which his individual share of her, as a joint tenant with the other executors, bore to the whole.

2. Same — Dingley Act — A part owner may limit his liability.

A consideration of the method by which a part owner may, under the second clause of section 18 of the Dingley Act, limit his liability, for the debts of a vessel, to the value of his fractional ownership therein.

MOTION for the direction of a verdict.

Hotchkiss & Maddox, for plaintiff.

Cowen, Wing, Putnam & Burlingham, for defendant.

COHEN, J. In September, 1894, the American brig, "John H. Crandon" of New York arrived at Barbadoes, W. I., seeking employment and consigned to the plaintiff, a merchant residing on that island.

The defendant is a citizen and resident of this state. His father, also a resident of New York, died in January, 1894, leaving a will, admitted to probate in Kings county, whereby he appointed the defendant and two others, his executors. The executors received letters testamentary in February, 1894, and one-thirty-second of the brig "Crandon" passed into their possession, as a part of the estate of Swan, Sr., deceased.

The defendant, being a shipping merchant, continued to act as the managing agent of the "Crandon," and the voyage on which she went to Barbadoes was made at his instance.

The master of the "Crandon," finding himself in want of funds while awaiting charter at Barbadoes, applied to the plaintiff for money alleged by him to be necessary for wages, supplies and repairs and the port charges of his brig.

The plaintiff thereupon paid certain bills incurred by the captain and advanced him some cash; the bills and cash together amounting (with the plaintiff's commission) to $714.78 (or £150 9s.

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8d.), for which sum the master gave a draft payable ten days after his vessel's arrival at port of discharge in Europe and for the payment thereof pledged his "vessel, her freight and owners."

The "Crandon" obtained a charter for Bremen, but having met with disaster while crossing the Atlantic, put into Bermuda in distress, was there repaired with money raised upon bottomry, on her arrival in Bremen was sold, and, her proceeds being absorbed by maritime liens prior to the draft above referred to, the plaintiff, as the holder thereof, was left no recourse other than a suit against the owners of the "Crandon."

This action is upon the draft given by the master; the defendant is sued individually, as one of the "Crandon's" owners, and judgment is demanded for the full amount of the instrument in suit.

By commission to Barbadoes, the plaintiff has shown the circumstances under which this draft was given; he has also introduced as his own witness the late master of the "Crandon," from whose testimony I find as a fact, that the cash received by him from the plaintiff, covered by the draft in suit, and amounting to $414.20, was given without any knowledge or inquiry on the part of the plaintiff as to the necessity of so large a sum for the purposes of the ship; that the master told plaintiff that he wanted this money for labor and repairs, for necessaries for the ship and for crew's wages; that, as matter of fact, the master applied $314.20 of the moneys received either in extinguishment of his own existing claim for wages or in payment of claims for his future services, and actually expended this $314.20 for his own personal use and gratification; the remaining $100 he applied to the payment of the crew or for their necessities.

I further find that the master of the "Crandon" did not need more than $100 cash at Barbadoes for the necessities of his ship and crew, in addition to the bills paid for him by the plaintiff and included in the draft in suit, and that the balance of the cash advanced, $314.20, was improperly obtained and wrongfully expended.

There is no direct evidence as to what would have been a usual and reasonable amount to cover the disbursements of a ship of the "Crandon's" size at Barbadoes, but a comparison of the amount advanced the "Crandon" with the advances to other vessels touching at Barbadoes and consigned to the plaintiff and the fact that $300 of the $414.20 was given the "Crandon's" master at one

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time and after $114.20 had been paid out in small sums, leads me also to find that the plaintiff, by the extravagance of the master's demands, should have been roused to an inquiry that would at once have revealed the impropriety of the last advance of cash.

I find the facts to be as hereinabove set forth and, in so doing, have considered as admitted in evidence all the answers to all the interrogatories addressed to the witness McCormick, some of which were provisionally excluded at the trial.

Both parties have moved for the direction of a verdict, the plaintiff demanding the face of his draft, with interest, and the defendant claiming that since his decedent owned but one-thirty-second of the brig and appointed by his will three executors, all of whom qualified, he is liable, under the act of Congress of June 26, 1884 (commonly known as the Dingley Act), for but one-ninety-sixth of the amount justly found due by all the owners.

Under these circumstances the duty is imposed upon the court of ascertaining the facts of the case as well as the law applicable thereto, its findings of fact having the force and effect of the verdict of a jury. Shultes v. Sickles, 147 N. Y. 704.

Both parties to this action have assumed in argument that the master of the "Crandon," by pledging not only his vessel and freight, but "her owners," rendered such owners liable for whatever sums the plaintiff was justified in advancing; and that this liability nothing but the Dingley Act can lessen or destroy.

It may well be doubted whether such results flowed from the transaction under consideration. The instrument in suit is a "master's draft," which is but an abbreviated form of bottomry. The Pride of the Ocean, 3 Fed. Repr. 162. If the master of the "Crandon" had not specifically pledged the credit of his owners, no liability would have attached to them beyond the amount of assets coming into their hands and growing out of the hypothecated vessel and freight. The Virgin, 8 Peters (U. S.), at p. 554. If, as a part of the bottomry transaction, the master had drawn a draft on his owners payable absolutely, the attempted hypothecation would have been invalid. Stainbank v. Fenning, 11 C. B. 51; Greeley v. Smith, 3 W. & M. 234, Fed. Cases, No. 5750; and it has been frequently held that, if a bottomry bond be given and a bill drawn on the owners for the same amount, the bill must share the fate of the bond. The Hunter, 1 Ware. 249, Fed. Cases, No. 6904; Maitland v. The Atlantic, Newb. 514; Fed. Cases, No. 8980.

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It is not perceived that uniting in one instrument the hypothecation of the vessel with the draft on the owners, personally, changes the principal of the cases cited; if the "Crandon" had been lost before arrival at her "port of discharge," the plaintiff would have wholly lost his money; and this is the essential feature of the transaction under review that renders it a clear case of bottomry; he has by the creation of prior liens lost the security of the vessel and freight, as thoroughly as if the "Crandon" had sunk outright, and it is questionable, in view of the language of the court in The Virgin, *supra*, and of Taney, Ch. J., in Naylor v. Baltzell, Tan. 55; Fed. Cases, No. 10061, whether he has not lost his recourse against the owners with the loss of lien on the vessel; whether the owners' liability has not vanished with their ownership, or, to vary the statement, whether it is within the power of a shipmaster to add, to a valid marine hypothecation of his vessel and freight, any pledge whatever of his owners' personal credit, beyond the proceeds of the hypothecated property coming into their hands.

As, however, no decision has been brought to my attention precisely covering the facts here presented, I shall assume, with the parties litigant, that the "Crandon," having arrived at a port of discharge in Europe, and the plaintiff having lost his lien upon her by no fault of his, he is entitled to pursue her owners under the language of the draft.

By common law the authority of a master in a foreign port is limited by the necessity of the case, and he cannot make the owners responsible for money not actually necessary, although he may *pretend* that it is. Grant v. Norway, 10 C. B. 665. This severe rule has been modified in instances where the lender neither knew, nor had reason to suspect, that the money loaned was not necessary. The Grapeshot, 9 Wall. at p. 141; The Lulu, 10 id. at p. 202. In this case, it being my opinion that the last advance (of $300) obtained by the master was given under circumstances that should have aroused to inquiry any prudent man accustomed to shipping, I disallow it, and hold that the master's act rendered the owners of the "Crandon" liable at common law for no more than $414.78.

It remains to ascertain by what law this contract is to be interpreted; the plaintiff contending that Barbadoes being a British dependency and no proof of foreign law having been offered, the common law is to be applied, by which one part owner, or person liable as such, is responsible *in solido* for debts lawfully incurred by the shipmaster.

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The first portion of this proposition is directly opposed to the judgment of Story, J. (in Pope v. Nickerson, 3 Story, 465, Fed. Cases, No. 11274), wherein it was held that the master in a foreign port has no power to bind his owners personally beyond the authority given him by them, which must be limited to their express instructions, or such as are to be implied from the law of the country whence the ship hails and where her owners reside; for there the authority is given, and by that law it is to be interpreted.

It is supposed that the judgment, in Liverpool, etc., Steam Co. v. Phenix Ins. Co., 129 U. S. at p. 458, *et seq.*, has overruled Justice Story's decision, has displaced the "law of the flag" as applicable to this case, and substituted the assumed law of Barbadoes, that being the *locus contractus*.

It is sufficient to observe that the case last cited arose from a contract of affreightment, and holds only that the parties to *such* a contract, made in New York, by New York shippers with a shipowner regularly transacting business there, "must be presumed to have submitted themselves to the law there prevailing" (p. 459) and does not in terms, or by indirection, overrule Pope v. Nickerson, *supra*, on the point judicially decided therein, which point is directly applicable to the proposition now under discussion.

Nor is the case of The Scotia, 35 Fed. Repr. 907, opposed to the decision of Justice Story. That case involved the enforcement of a maritime lien, and it may well be admitted, that the "Crandon's" captain lawfully pledged his *vessel* at Barbadoes (perhaps in defiance of the law of his flag), and thereby created a lien enforcible in the admiralty courts of every country, without raising any presumption that his owners, personally and individually, must by his act "be presumed to have submitted *themselves* to the law there prevailing."

Pope v. Nickerson, *supra*, has been referred to with distinct approval by our own Court of Appeals (King v. Sarria, 69 N. Y. at p. 33), and I am satisfied, both on principle and authority, that the contract here to be enforced is governed by the *law of New York*, of which the general statutes of the Congress of the United States are an integral part.

What protection, therefore, does the "Dingley Act" afford to this defendant, who, if not entitled to its benefits, must respond for the full amount used for necessaries?

Before approaching the merits of this branch of the case, the plaintiff asserts that, because the defendant has not pleaded the "Dingley Act," he is entitled to none of its benefits.

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Upon the record before me, I do not find it necessary to decide the point thus raised, which is based on the peculiar nature of the act in question, for I do not understand the plaintiff to assert that this court ordinarily needs proof of the existence of a general statute of the national Congress. The complaint herein alleges that defendant individually was an "owner" of the "Crandon" and it shows no other ground of liability than such ownership. This allegation the answer denies. Under these pleadings the plaintiff has not even attempted to prove the alleged ownership. His evidence and argument both show that the real ground on which the defendant is sought to be charged is, that being one of the executors of a part owner, he used a portion of his decedent's estate, *i. e.*, the brig "Crandon," in a business venture not even begun by the decedent and not necessary for the settlement of such decedent's estate. He is, therefore, liable individually, on the engagement of his agent, the shipmaster, as if he were in his own right a part owner of the brig. Austin v. Munro, 47 N. Y. 362; Thompson v. Whitmarsh, 100 id. 35. This is true, but it does not make the defendant *individually* an owner.

The defendant, however, has not moved for a dismissal of the complaint on the ground of this material variance between allegation and proof, and the court must, therefore, consider the cause of action disclosed by the *evidence* and gave such decision as is warranted thereby; to do otherwise would be error. Knapp v. Simon, 96 N. Y. at p. 292; Holcomb v. Campbell, 118 id. 46. One, who propounds a complaint fatally defective, can hardly complain of an answer sufficient to defeat his complaint; and, without deciding that under any circumstances it is necessary to plead that portion of the statute in question on which the defendant relies, I shall consider whatever application it may have to the facts here proven.

The act is as follows:

"That the individual liability of a shipowner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending." Act June 26, 1884, § 18, Supp. Rev. Stat. U. S., vol. I, p. 443.

It is urged that this statute does not affect the liability of a shipowner for his *personal* contracts; and this is true (Laverty v. Clausen, 40 Fed. Repr. 542, and cases cited; McPhail v. Williams,

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41 id. 61), but the contract under consideration is not the personal contract of this defendant or any owner of the brig "Crandon." The plaintiff paid the bills and advanced the money covered by the draft in suit upon the request of the "Crandon's" captain alone and "without the privity or knowledge of this defendant, or the other owners, and without any contract with them, except so far as the master had implied authority to bind them as part owners for necessaries." Whitcomb v. Emerson, 50 Fed. Repr. 128.

It is further contended that, as this statute has frequently been held to be *in pari materia* with the Limited Liability Act of 1851 (U. S. Rev. Stat., §§ 4283, *et seq.*), it is necessary, in conformity with the practice under that statute, to prove and surrender the value of the vessel out of which the claim in suit arose (or of the defendant's interest in such vessel) and then limit the plaintiff's recovery to the value so proven.

This interpretation of the statute confessedly does violence to the apparently plain meaning of the first sentence of section 18; but it is argued that unless (in this case) the defendant shows what one-thirty-second of the "Crandon" was worth and limits the plaintiff's recovery (and all other just claims) to that amount, he may be compelled to continue paying to other plaintiffs one-thirty-second parts of their several claims until his share in the "Crandon" becomes a trifle compared to the aggregate of judgments against him. Or, it is said, a claim for $32,000 may be pressed against the owner of one-thirty-second of a vessel worth $3,200,— and the question is asked, shall such owner of an hundred dollar share be compelled to pay $1,000?

Doubtless the claims against the owners of a vessel may vastly exceed the value of their vessel and it is true that the results above indicated may occur, if the owners are sufficiently ill-advised to suffer them and rely only on the first sentence of section 18, *supra;* but it seems plain that, under the second sentence thereof, proceedings may be taken analogous to those long familiar under the act of 1851, *supra*, to bring all the creditors of the shipowners into concourse, distribute to them the value of the ship and her freight, or of the shares of those owners taking the proceedings, and by injunction restrain future suits or demands. Nor is it doubtful that a single part owner of vessel property may in a proper case limit his liability, as above indicated under the second sentence of section 18, to the value of his own interest. If, in the case last supposed, one person owned the *whole* of a vessel worth $3,200, he

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would under the first sentence of section 18 be obliged to pay the whole of a claim of $32,000; which would obviously compel him to institute proceedings under the second sentence of the statute,—and if an individual owning an entire ship can pursue this course, there is no reason, and nothing in the statute considered in its intirety, preventing an owner, of but a small fraction of a ship, limiting his liability to the whole world to the value of his fractional ownership.

Doubtless the portion of the act of 1884 now under consideration might be more clearly expressed; but, while believing its correct interpretation to be as above indicated, it is for the purposes of this case sufficient to quote the language of Webb, J., in the Giles Loring, 48 Fed. Repr. at p. 474:

"This statute was evidently designed to modify in some way the liability previously imposed by law, and to relieve shipowners of some portion of that liability. * * * Relief in this way is not in terms made to depend upon the condition that the owners are in position to take advantage of the other portion of the statute, and be discharged of all liability beyond the value of their shares of the vessel. The burden of a part owner, who can free himself from debt or obligation by the surrender of his interest in the vessel, did not more urgently appeal to be lightened than that of him who must respond to the full extent of the liability, however small the value of his property. * * * That end would be promoted by discharging part owners from a liability *in solido* for the debts of each other. A construction giving such discharge is consistent with the language of the act, conforms with the intention of Congress and regards strictly the defect to be corrected."

In this case the claim is confessedly of a nature capable of being limited; the defendant has apparently taken no steps to ascertain whether there are other claims against him arising out of his conduct with the brig "Crandon" and is content to rest upon the partial and entirely new protection afforded to shipowners by the first sentence of section 18 of the act of 1884. To this protection he is entitled, and if hereafter other claims are presented, it will then be time enough for him to consider whether he should not seek the perfect discharge afforded to him, upon surrender of the value of his decedent's interest, by the second sentence of the act in question.

This is in accord with the judgments in Whitcomb v. Emerson, *supra*, and Warner v. Boyer, 74 Fed. Repr. 873.

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I cannot, however, accede to the defendant's proposition that he is liable under the Dingley Act for but one-ninety-sixth of the amount herein allowed. Executors receive the estate of their decedent by the same will, for the same time, and with the right of survivorship. They are, therefore, joint tenants seized, *per my et per tout*, and the defendant as such joint tenant is liable as if he had owned in his own right as large a share of the brig "Crandon" as did his decedent.

A verdict in favor of the plaintiff is directed for one-thirty-second of $414.78, with interest, amounting in all to $15.68.

Ordered accordingly.

LIZZIE DOTY, as Administratrix, Etc., of JOHN DOTY, Deceased, Plaintiff, *v.* THE VILLAGE OF PORT JERVIS, Defendant.

(Supreme Court, Orange Special Term, April, 1898.)

1. Municipal corporations — Not liable for acts of their officials in matters of governmental concern.

Municipal corporations are not liable for the acts or omissions of their officials in relation to matters of purely governmental concern.

2. Same — Complaint in an action for the death of one, killed by a special policeman who is alleged to have been a dangerous character.

A complaint which alleges that the plaintiff's husband was killed at a village by its special police officer, that the officer was appointed by the president of the village, that the officer was incompetent and dangerous, that the village had actual notice of his incompetency and dangerous character and that the killing of the husband was the action of an incompetent, negligent and dangerous person, states no cause of action against the village.

DEMURRER to complaint.

Wilton Bennett, for plaintiff.

John W. Lyon, for defendant.

HIRSCHBERG, J. The defendant demurs to the complaint upon the ground that it does not state facts constituting a cause of ac-

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tion. It alleges that the plaintiff's decedent, her husband, was killed in October, 1895, at the village of Port Jervis by one Edward G. Loreaux, then a special police officer of the village; that he was appointed such officer by the president of the village; that he was an incompetent, inefficient, negligent and dangerous man, utterly unfit and incompetent to fulfill the duties of the office occupied by him; that the defendant had actual notice of his unfit and dangerous character; and that the killing of her husband was the action of an incompetent, negligent and dangerous person. The complaint demands judgment for $25,000, damages resulting from such death as the consequence of defendant's negligence in permitting Loreaux to discharge the duties of his said office. The facts and circumstances of the homicide are not detailed, nor is it alleged that Loreaux was at the time acting for the defendant, engaged in the discharge of any duties pertaining to his office, or that the killing was the result of any carelessness or negligence upon his part.

Assuming that under any conceivable circumstances the action could be maintained, the complaint would nevertheless be fatally defective because of the absence of sufficient facts to justify the charge made against the village. But it is well settled that the action will not lie in any event. Municipal corporations are not liable for the acts or omissions of their officials in relation to matters of purely governmental concern. This doctrine has been considered and applied by the Court of Appeals, recently in the cases of Hughes v. County of Monroe, 147 N. Y. 49, and Fire Ins. Co. v. Village of Keeseville, 148 id. 46. In the former case an attempt was made to recover damages for an injury sustained while operating a steam mangle belonging to the defendant in the laundry of the county insane asylum; and in the latter case to recover damages for negligent failure to maintain effective water works and fire appliances as required by law. In both cases the functions to be exercised were declared to be public and not individual in their nature, involving the exercise of sovereign power delegated by the state, and creating no liability for the negligence of the agents of the municipality, or for the nonuser or misuser of the power conferred. To the same effect is the case of Maxmilian v. Mayor, 62 N. Y. 160, where the plaintiff sought to recover damages for the death of her intestate, who was killed by an ambulance wagon negligently driven by an employee of the commissioners of charities and corrections. It was held that when

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the city of New York, by legislative enactment, was required to elect or appoint an officer to perform a public duty laid not upon it, but upon the officer, in which it had no private interest, and from which it derived no special advantage, such officer is not a servant or agent of the municipality for whose acts it is liable even though the officer had in charge and was negligently using corporate property. The nonliability of municipal corporations having special charters for the acts of their officers when engaged in the discharge of public duties, and to that extent exercising acts of sovereignty, is established by numerous authorities. Ensign v. Supervisors of Livingston County, 25 Hun, 20; Alamango v. Supervisors of Albany County, id. 551; Ham. v. Mayor, 70 N. Y. 459; Smith v. City of Rochester, 76 id. 506; Benton v. Trustees of Boston City Hospital, 140 Mass. 13; Curran v. City of Boston, 151 id. 505.

In Buttrick v. City of Lowell, 1 Allen, 172, a case was presented exactly in point, and it was held on the authority of the principle herein asserted that a city is not liable for an assault and battery committed by its public officers, even though it was done in an attempt to enforce an ordinance of the city. The court said "Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government; but this does not render them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and others are intrusted, are derived from the law, and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers and duties the city or town cannot be held liable."

In Culver v. City of Streator, 130 Ill. 238, the plaintiff was shot and wounded by a police officer while the latter was carelessly and negligently attempting to kill a dog in the enforcement of an ordinance prohibiting the running at large of unlicensed and unmuzzled dogs, and it was held that the policeman was not an officer or agent of the city and that the latter was not liable for the injuries resulting from his carelessness and negligence in the discharge of his public duties.

The complaint asserts no negligence whatever on the part of the defendant as a corporation. The appointment of the police officer

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was not its act, but the act of its president over which it possessed neither control or supervision. The case is to be distinguished from those cited in the plaintiff's brief and in which injuries resulted from the negligent exercise of general municipal powers as distinguished from governmental powers, in this instance the police power. The principle of immunity is laid down in Shearman & Redfield on Negligence, § 253, fourth edition, as follows: "The governmental powers of the state are further exercised by a great number of municipal and quasi-municipal organizations, such as cities, towns, counties and boards, to which for purposes of government and for the benefit and service of the public, the state delegates portions of its sovereignty, to be exercised within particular portions of its territory, or for certain well-defined public purposes. To the extent that such local or special organizations possess and exercise governmental powers, they are, as it were, departments of state; as such, in the absence of any statute to the contrary, they have the privilege and immunity of the state; they partake of the state's prerogative of sovereignty, in that they are exempt from private prosecution for the consequences of their exercising or neglecting to exercise the governmental powers they possess. To the extent that they exercise such powers, their duties are regarded as due to the public, not to individuals; their officers are not agents of the corporation, but of 'the greater public,' the state. No relation of agency existing between the corporation and its officers, with respect to the discharge of these public, governmental duties, the corporation is not responsible for the acts or omissions of its officers therein. This is nothing more than an application and proper extension of the rule that the state is not liable for the misfeasance of its officers."

It follows that the defendant should have judgment upon the demurrer, with costs.

Judgment upon the demurrer, with costs.

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THE PEOPLE ex rel. HENRY B. SWARTWOUT, Relator, *v.* THE VILLAGE OF PORT JERVIS et al., Respondents.

(Supreme Court, Orange Special Term, April, 1898.)

1. **Municipal corporations — Village trustees cannot add a new name to an assessment-roll on grievance day — Waiver.**

Under a village charter providing for the preparation, in the first instance, by the town clerk of an assessment-roll and for its subsequent correction by the board of trustees, under powers similar to those enjoyed by boards of supervisors, the trustees have no power, upon grievance day, to enter upon the roll an assessment for personal property against a person whose name was not then on it but who, having heard that he was to be assessed, voluntarily appeared before the trustees and submitted to an examination relative to his personal property.

2. **Certiorari to review an assessment — Failure to give notice of the completion of the roll leaves unlimited the time within which the writ may be sought.**

Where no notice of the final completion of an assessment roll has been given as required by the Tax Law (Laws of 1896, chap. 908, § 38), the time within which an application for a writ of *certiorari* to review the determination, may be made has not been limited.

CERTIORARI to review an assessment of personal property.

R. Ed. Schofield & Wm. A. Parshall, for relator.

John W. Lyon, for respondents.

HIRSCHBERG, J. The present village charter was passed May 11, 1898. It abolished the office of assessors and charged the clerk with the duty of preparing the assessment-roll in the first instance so far as possible "from the last preceding assessment-roll of the town of Deer Park after its final revision by the town assessors, following said town assessment-roll as to valuation of taxable property;" and it charged the board of trustees with the duty of correcting and finally completing the roll so made by the clerk. The board is vested with power to make such corrections "in the same manner as boards of supervisors may by law correct

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the town rolls of their county." The board is also vested with power to add to said assessment-roll any property improperly omitted therefrom, at a just and equitable valuation, and where the valuation of any taxable property cannot be ascertained from the last assessment-roll of the town, or where such valuation has increased or diminished since such assessment, or any error, mistake or omission shall have been made by the town assessors in a description or valuation of taxable property, "the trustees shall ascertain the true value of the property to be taxed from the best evidence in their power, give notice to the persons interested and proceed in the same manner as the town assessors are required by law to proceed in the valuation of taxable property and hearing all grievances and a revision of the town assessment-roll."

In accordance with these provisions the town clerk prepared the assessment-roll for 1896, and notice was given that the board of trustees would revise and correct it on the 16th day of June, 1896. It did not contain any assessment against the relator for personal property. He heard, however, that the board intended to assess him for bank stock held by him and he appeared before them on the 16th to protest against such assessment. On that day he made affidavit and submitted to an oral examination under oath, swearing to existing indebtedness in excess of his personal estate, and not created for the purpose of avoiding taxation. The board then had in its possession lists of the stockholders in the local banks, and by resolution such lists were then annexed to the assessment-roll, and thereafter such roll was altered and completed by inserting opposite the relator's name the assessment complained of for personal property.

It seems clear that this assessment was unlawful. After the roll is completed and notice given that grievances will be heard on a day stated, the roll can only be altered by the correction of errors, while changes in the persons or property assessed or the adjudged valuations can only be made upon the complaint of the party aggrieved. People ex rel. Chamberlain v. Forrest, 96 N. Y. 544. The relator finding no assessment against him for personal property might well have remained away on grievance day and no assessment could lawfully have been made against him on that day. His voluntary attendance to protest did not waive the immunity nor confer jurisdiction upon the board. The lists of stockholders did not constitute any part of the assessment-roll, and in this respect the case is clearly distinguishable from People ex rel. D., L. & W.

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R. R. Co. v. Clapp, 64 Hun, 547, cited by the respondents' counsel. In that case the roll was in separate sheets, but in legal form, and those sheets when afterwards bound together comprised the completed roll. In this case the lists formed no part of the final roll, but merely furnished information to the board as a basis for new and additional assessments which were afterwards incorporated in the roll. The difference is vital and fatal.

The application for the writ of *certiorari* was timely. The papers do not show that the notice of final completion of the roll was given as required by section 38 of the Tax Law (chap. 908 of the Laws of 1896, taking effect June 15, 1896), and the time for the application for the writ is accordingly unlimited. People ex rel. R., W. & O. R. R. Co. v. Haupt, 104 N. Y. 377, and Matter of Corwin, 135 id. 245.

In making this decision I do not wish to be understood as assenting to the proposition of relator's counsel that the town clerk may not add persons and property not on the preceding roll or that the board may not upon due notice make like additions. The decision goes no further than a denial of the power of the board to make additional assessments on grievance day without notice.

Judgment is ordered in favor of the relator, without costs.

Judgment for relator, without costs.

Matter of the Final Judicial Settlement of the Accounts of ANN MILLER, as Administratrix, Etc., of ANDREW J. MILLER, Deceased.

(Surrogate's Court, Otsego County, April, 1898.)

Bills and notes — Joint obligation — Counterclaim.

A note in the form:

"April 10, 1894. One day from date for value received, we promise to pay A. J. Miller, or bearer, one hundred and fifty-three dollars, with int.

"LEVI CROUNSE,
"EMMA CROUNSE."

is a joint obligation and cannot be made the subject of a counterclaim, upon the part of the estate of the deceased payee, as against the individual claim of one of the makers against the estate.

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PROCEEDINGS in a Surrogate's Court for the determination of the claim of Emma Crounse, presented to the administratrix of the estate and rejected by her.

S. W. Barnum, for administratrix.

Charles T. Brewer, for Emma Crounse.

Clarence M. Bates, for Samuel Davidson, and others.

J. W. Barnum, for Jacob Kreischer.

ARNOLD, S. Emma Crounse, the claimant, was, at the times hereinafter stated, a resident of the town of Roseboom, Otsego county. In the spring of 1896, she held on the premises occupied by her, an auction, selling her farm stock, hay, etc. At that auction, one Andrew J. Miller purchased some stock and some hay, the purchase price being $130.82. In May of the same year, Miller died and Ann Miller, his wife, was duly appointed administratrix of his goods, chattels and credits, by the Surrogate's Court of Otsego county.

During the course of her administration, Emma Crounse presented a claim for the purchase price of the personal property purchased by said Miller at the auction sale above referred to.

This claim was rejected and came on for determination upon the final judicial settlement of the accounts of the administratrix.

The claim presented is fully proven and must be allowed.

The administratrix offers in evidence by way of counterclaim, a note of which the following is a copy:

"April 10, 1894. One day from date for value received we promise to pay A. J. Miller or bearer one hundred and fifty-three dollars with int.

"LEVI CROUNSE,
"EMMA CROUNSE."

This note is in form the joint obligation of Levi Crounse and Emma Crounse. Daniel on Negotiable Instruments (4th ed.), § 94.

Can this joint obligation be set up and allowed as a counterclaim against this claim of Emma Crounse in this proceeding? As the matter stands, the administratrix seeks to offset against the claim

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of Emma Crounse a joint obligation against Emma Crounse and Levi Crounse.

It is a well-settled principle of law that a joint debt cannot be set off against the individual debt, and conversely an individual debt cannot be set off against a joint debt. In an action brought by a plaintiff against a defendant upon an individual liability of the defendant, he cannot set up as a counterclaim a joint liability of the plaintiff and some other person.

Within that authority, I do not see how this joint note of Levi Crounse and Emma Crounse can be allowed as a counterclaim against the individual claim of Emma Crounse. Spofford v. Rowan, 124 N. Y. 108.

This view of the matter leaves it unnecessary to consider the admissibility of the evidence of Levi Crounse offered by plaintiff and also makes it unnecessary to consider upon the merits the effect of that evidence. I think it is clearly the duty of the administratrix of this estate to bring an action upon this note against the joint makers Levi Crounse and Emma Crounse.

There is also presented by the administratrix, as a counterclaim, a note for $59, made by Emma Crounse, payable to the order of Andrew J. Miller and indorsed by Andrew J. Miller, which is now held and owned by the National Central Bank of Cherry Valley.

In settlement of the decree the claim of Emma Crounse will be allowed at $132.80.

The note held by the National Central Bank of Cherry Valley may be allowed as a set-off against this claim of Emma Crounse to the extent of the liability of the estate of Andrew J. Miller, upon said note. A decree may be entered accordingly.

Decreed accordingly.

Matter of the Estate of LUANIA CARDOT ACKELS, Deceased.

(Surrogate's Court, Chautauqua County, April, 1898.)

Probate — A will cut in two parts, but by some one other than the testatrix — Revocation — Implied revocation.

The proponent of an alleged will presented for probate two separate sheets of paper, formerly constituting one sheet of legal cap, one of which contained the disposing part of a will and the other the signature of the testatrix and the attestation clause. Proof was made

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that the will was duly executed and no direct proof was given as to how the sheets became separated. A son of the scrivener of the will testified that, in his father's lifetime, he saw the sheet which contained the disposing part in his father's desk but that he did not see the other sheet. After the death of his father, and one year after the death of the testatrix, both parts were found in the desk and also a paper written by the scrivener and signed, but not executed in the manner required for the revocation of a will, by the testatrix, which purported to be her requests as to the disposition of her property after her death and which contained the recital, "Requests of Luania Cardot Ackels (the testatrix), for the division of her property, having given it all to Marvin and Frank Cardot." Slight additional evidence was given that she had disposed of all her property in her lifetime.

Held, that the sheets were entitled to probate as a will.

That there was no proof that the testatrix had revoked the will by cutting it apart herself, nor was there any by witnesses who saw such a revocation made by a third person at the request of the testatrix.

That no revocation was to be implied from the alleged disposition by the testatrix of all her property in her lifetime, as this was not sufficiently proved, and, even if proved, should not prevent the beneficiary from proving the will, to the end that its effect might be thereafter determined.

THIS is an application for the probate of an instrument purporting to be the last will and testament of Luania Cardot Ackels, deceased.

The issue in the proceeding is whether the will had been revoked by the testatrix before her death. The facts as we deem them established by the evidence, so far as material, are stated in the opinion.

Hooker & Dikeman, for proponent.

Ottoway & Munson, for contestant.

WOODBURY, S. The proponent presents two papers which together constitute, as she claims, the last will and testament of the deceased. The two papers make and constitute one full sheet of legal cap paper. At one time these papers were one complete instrument and when so complete was the last will and testament of the deceased, properly executed, and was the free and voluntary act of a competent testatrix. These papers have been marked

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respectively Exhibits "A" and "B." Exhibit "A" is the disposing part of the will, and Exhibit "B" contains the signature of the testatrix, the seal, the attestation clause, and the signatures of the witnesses. Exhibit "B" was cut from Exhibit "A." We are thus to determine whether the instrument which once constituted the will of this decedent has been canceled and revoked by the cutting off of the signature, attestation clause and signatures of the witnesses. This is the sole question in the case and must be determined from the evidence and circumstances adduced upon the hearing. This evidence is meagre and unsatisfactory and the disposition of the question must depend largely upon presumptions.

John C. Griswold, a resident of the town of Arkwright, in this county, was sent for by the testatrix to prepare and superintend the execution of her will. He went to her residence pursuant to such request and prepared and superintended the execution of the instrument formed by the component parts, Exhibits "A" and "B." Mr. Griswold was a man who frequently prepared wills and other papers for his neighbors and friends in the community of his residence and was in the habit of taking charge of such instruments and papers for safe-keeping. It does not appear what was done with the will in question after its execution; whether it was taken by Mr. Griswold for safe-keeping or was retained by the testatrix. The first we learn of the whereabouts of the will, after its execution, is in the possession of Mr. Griswold about one year after the decease of the testatrix. It is then found at his residence, in a desk in which he kept papers and legal documents, by Cassius M. Griswold, his son, and when so found it had been cut in two, Exhibit "B" having been cut off and severed from Exhibit "A," the remainder of the instrument. John C. Griswold died subsequent to this incident and the two parts of the will afterwards passed into the possession of the son Cassius, and from his possession were traced to this court in a proper manner. Cassius M. Griswold testifies that, at the time he saw the will in his father's desk during the lifetime of the latter, he did not find Exhibit "B" with the other part of the will, but only found that part of the instrument marked Exhibit "A," which is the disposing part thereof. In view of the fact that, at a time subsequent to the death of John C. Griswold and when the desk in which his papers were kept passed into the custody of Cassius, Exhibit "B" was found in the desk with the other part of the will, we think we are not justified in finding or presuming that this part of the will

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had been taken away by the testatrix in her lifetime, with intent to revoke the will, and after her death had been surreptitiously returned, but that it must have been in said desk at the time Cassius saw the other part of it therein. He does not testify that he examined all of the papers in the desk at that time or that Exhibit "B" was not therein. All he says is that he did not see it at that time. There is slight circumstantial evidence in the case that the testatrix disposed of her property in her lifetime, and a paper has been produced in evidence which purports to be the requests of the testatrix with respect to the disposition of her property after her decease, which contains the following recital: "Requests of Luania Cardot Ackels for the division of her property, having given it all to Marvin and Frank Cardot." This paper is in the handwriting of John C. Griswold and signed by the testatrix. It bears no date, is unattested and there is no direct evidence tending to show the time of its execution. The first we learn, and the only evidence we have concerning it, is that it was found by Cassius M. Griswold in his father's desk with Exhibit "A" at the same time that he found the latter instrument there one year after the death of the testatrix.

In view of the fact that the will, as orignally executed, contained a detailed disposition of all the property of the testatrix, it may be fairly assumed that this instrument was executed after the execution of the will. This brings us to the consideration of legal principles governing the revocation of wills. The statute (2 R. S., chap. 6, tit. 1, § 42) prescribes the manner in which a will once duly executed may be revoked and precludes any other mode of affecting such revocation. It reads as follows: "No will in writing except in the cases hereinafter mentioned, nor any part thereof shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burned, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by any other person in his presence by his direction and consent; and when so done by another person, the direction and consent of the testator and the fact of such injury or destruction shall be proved by at least two witnesses."

It is conceded that the instrument, purporting to be the requests of the testatrix, does not operate as a revocation of the will by

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reason of the fact that it was not "executed with the same formalities with which the will itself was required by law to be executed." But it is claimed that it was revoked, first, because it was cut in two and canceled with the intent and for the purpose of revoking the same, and, second, that the testatrix, having disposed of all of her property in her lifetime, such act operated as an implied revocation of all wills previously executed. To effect the revocation of a will by cancellation, as in this case, two things must concur, namely, the actual cutting in two, and that such act be done with intent to effect the revocation. The one thing, the act which is to be done, is prescribed by the statute referred to. It must be done by the testatrix herself or by some third person in her presence and in the presence of two witnesses by whom such act is to be proved. In our opinion we are not to presume that the act of cutting, in this case, was done by the testatrix herself. We think it cannot be presumed that, having the instrument in her possession, she would cut it in two with an intent to revoke and destroy it and thereafter take the separate parts and place them in the custody of Mr. Griswold. But, upon the contrary, from the circumstances in the case we are to presume that the will, at the time of its execution, was placed by the testatrix in the hands of Mr. Griswold for safe-keeping and that he had the custody and possession thereof during the whole period of time from its execution until it was seen by his son after the death of the testatrix. We, therefore, conclude that the physical act of cutting and destruction was not done by the testatrix. It may not be presumed upon the other hand that Mr. Griswold having the custody of this paper would cut it in two, or otherwise mutilate or destroy it except by the direction or request of the testatrix, and whatever presumption may arise that the act of cutting was performed by Mr. Griswold must be coupled with the further presumption, that if he did it, it was by the direction and the consent of the testatrix; and assuming such to have been the case, or that the cutting was done by some person other than Mr. Griswold by the direction and consent of the testatrix, such act would not operate as a revocation of the will, because no witnesses were present to prove or attest it.

We are now brought to the final contention in the case that the will was impliedly revoked by the disposition of all the property of the testatrix in her lifetime. We are not prepared to yield to this contention. First, because we are not satisfied from the evidence, and cannot find, as a fact, that the testatrix did dispose of all

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of her property after the making of the will, and prior to her death; and, secondly, because if she had done so, in our opinion, that should not defeat the probate of the will. Such act on her part may well operate to prevent the beneficiary from enjoying the fruits of beneficence as stated in the will, yet it does not follow of necessity that it would work a complete revocation of the will; and we think the will in such a case should be admitted to probate, leaving its effect to be determined when the legatee or devisee prefers his claim. We reach the conclusion that there was no valid revocation of the will in question, and that the instruments Exhibit "A" and "B" should be admitted to probate as and for the last will and testament of the testatrix.

A decree will enter admitting such instrument to probate.

Decreed accordingly.

RACHEL DELMAGE, Respondent, *v.* MOSES R. CROW, Appellant.

(Supreme Court, Appellate Term, April, 1898.)

Assault and battery — Rebuttal — Right of the defendant to show that he did not authorize threats by which his agent procured from the plaintiff a release or receipt "in full of all claims and demands."

A servant, who had brought an action against her former master for assault and battery, was allowed to prove upon the trial that when she, upon her discharge, signed a receipt "in full of all claims and demands," presented to her for signature at the instance of her master by a fellow servant, the latter told her, in substance, that she (the plaintiff) would be kicked off the private car, where she had been serving her master, unless she signed. The receipt had not at this time been offered in evidence, but had been pleaded by the master as a release.

Held, that the court erroneously refused to allow the master to testify that he had not authorized the making of the threat, as proof of it was calculated to inflame the minds of the jury and increase the verdict against him.

Delmage v. Crow, 22 Misc. Rep. 511, reversed.

APPEAL from a judgment of the General Term of the City Court of the City of New York, affirming a judgment rendered upon the verdict of a jury in favor of the respondent.

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Franklin Bien, for appellant.

Frederick E. Anderson, for respondent.

BEEKMAN, P. J. The respondent sued the appellant to recover damages for an alleged assault and battery. The latter denied the charge, but also set up by way of affirmative defense a release from the respondent. The paper, however, which is relied upon in support of this plea was not under seal, but was simply in the form of a receipt signed by the respondent acknowledging the payment to her by the appellant of the sum of $8.50 "in full of all claims and demands."

The respondent was a servant of the appellant, and at the time the receipt was given had been discharged by him, and according to his own testimony the money so paid was for wages which were due to her. No accord and satisfaction with respect to the alleged assault was set up in the answer or proved upon the trial. On the contrary the appellant maintained to the end of the trial that the testimony of the respondent in support of her complaint was absolutely false, and that at the time the receipt was given and the money paid nothing was said upon the subject. The respondent testified that the receipt in question was sent by the appellant to her for her signature two days after the alleged assault, through a fellow servant named Anna Farrell, and on her direct examination she was allowed to give the following evidence with respect to this paper: "Q. Anna asked you to sign it and if you did not you would be kicked off the car? A. Yes." Counsel for the appellant objected, but the court overruled the objection and an exception was taken. The respondent at that time was on the private car of the appellant at Chicago, and the latter with his family was then staying at a hotel in that city.

The appellant was subsequently examined on his own behalf, when he was asked by his counsel whether he said anything to Anna with respect to the receipt except to procure the respondent's signature. The question, however, was excluded by the court upon the objection of counsel for the respondent, to which ruling an exception was taken. The respondent refused to sign the receipt when it was thus presented to her, but did so shortly afterwards upon the personal request of the appellant. At the time of this request there were no threats of any kind made by the appellant to her. All that passed between them was an inquiry on his part if she would sign the paper and her assent.

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We think the court erred in refusing to allow the appellant to disavow any instructions or authority from him to Anna Farrell to make the threat, which, as the respondent testifies, was associated with the demand made upon her for her signature. Assuming that the respondent was entitled to show all that took place with respect to the receipt for the purpose of explaining her motives in ultimately signing it, the evidence which she gave that she was told she would be kicked off the car if she failed to sign it was calculated to inflame the minds of the jury against the appellant, and it may reasonably be inferred contributed to swell the large verdict which was rendered against him. The jury may well have inferred that the threat came from the appellant, as it is conceded that the paper was brought to the respondent by a person who was authorized by him to present it to her for signature. Under these circumstances he was entitled in all fairness to disclaim any responsibility whatsoever for the offensive and minatory language that was used. The respondent had testified that she had been most atrociously beaten and maltreated by him. It is true that her story was absolutely denied by him, but the jury preferred to believe her, and such belief must have been accompanied by a feeling of deep indignation on their part against him, and doubtless prompted a determination to render such a verdict as would punish him as well as compensate her for what she had suffered. It was, therefore, a matter of prime importance to the appellant, and justice demanded no less than that he should be allowed to show that the threat so made was in no way sanctioned by him, especially as the issue was so close that the impression produced upon the jury by the testimony complained of may well have tipped the balance in favor of the respondent. We think it was error to exclude the evidence of the appellant upon this point for which the judgment should be reversed. The respondent cannot reasonably complain of a situation which is of her own creation.

The receipt was not in evidence at the time, and was not offered until the appellant entered upon this proof. Any explanation which it was desirable she should make with respect to it properly formed a part of her rebuttal, and had the objection been made on this ground when she was questioned by her counsel with respect to the matter, the court would doubtless have excluded it. Had this course been pursued, and had the reception of the receipt in evidence been objected to by the respondent's counsel when it was offered by the appellant, it would doubtless have been excluded, as it was not a release, and according to the appellant's own testi-

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mony had nothing whatsoever to do with any claim on the part of the respondent with respect to the matters alleged in her complaint. There would then have been no occasion for an explanation of the signing of the receipt such as the appellant was allowed to give. The conclusion cannot be avoided that the evidence with respect to this receipt was injected into the respondent's case by her counsel rather for the purpose of inflaming the minds of the jury against the appellant than to explain her conduct in signing a paper which had not as yet been offered in evidence and was not before the court and jury.

The judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

ALBERT KRAETZER, Respondent, *v.* EMIL THOMAS et al., Appellants.

(Supreme Court, Appellate Term, April, 1898.)

1. **City Court of New York — Conduct of defendants which admits that there are questions for the jury.**

   Where the defendants do not move to dismiss, nor ask for the direction of a verdict, or except to the charge made, or request that any charge be made, there is an unequivocal concession that there are questions of fact for the jury.

2. **Same — What orders relative to new trials are appealable to the Appellate Term.**

   An order of the City Court of New York denying a motion for a new trial, when affirmed by its General Term, is not further appealable. Only orders granting new trials and questions of law, which are raised by proper exceptions, are reviewable by the Appellate Term.

Kraetzer v. Thomas, 22 Misc. Rep. 557, affirmed.

APPEAL from a judgment of the General Term of the City Court of the City of New York, affirming a judgment rendered upon the verdict of a jury in favor of the respondent.

John L. Branch, for appellants.

John Hill Morgan, for respondent.

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BEEKMAN, P. J. At the close of the respondent's case, the attorney for the appellants moved to dismiss on the ground of the insufficiency of the respondent's proofs. The motion was denied and an exception was taken to the ruling of the court. There was no renewal of the motion, however, at the close of the appellants' case, nor was the direction of a verdict asked for, but the case was submitted by the court to the jury without any question being made as to the propriety of this course. No exceptions were taken to the charge of the trial justice, nor were any requests to charge submitted to him by the attorney for the appellants. There was, therefore, an unequivocal concession on his part that there were questions of fact in the case which should be passed upon by the jury, and that there was some evidence tending to support the respondent's cause of action.

The exception taken to the denial of the motion to set aside the verdict and for a new trial, made upon the minutes of the judge after the verdict had been rendered, raises no question for review here. An exception is not proper in such a case, but an order expressing the determination of the court upon the motion must be made and entered. This, it is true, was done here, but as an order denying a motion for a new trial is not appealable to this court, the affirmance by the General Term below of the order in question was final. Upon appeals to this court from the City Court after a trial has been had, only orders granting new trials and questions of law raised by proper exceptions in the course of the trial can be considered. As there are no exceptions presenting any grounds for reversal, it follows that the judgment must be affirmed, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment affirmed, with costs.

SARAH KAMERMANN, an Infant, Etc., Respondent, *v.* THE EISNER & MENDELSON CO., Appellant.

(Supreme Court, Appellate Term, April, 1898.)

1. Security for costs from infant plaintiff — When notice must be given to the plaintiff.

An order, made under subdivision 5 of section 3268 of the Code of Civil Procedure, permitting a defendant to require security where the plaintiff is "an infant whose guardian *ad litem* has not given such

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security," is an *ex parte* matter and requires no notice to the plaintiff; but where such an order is procured under section 3271 of the same Code, making security discretionary, notice must be given.

2. Same — Prior security voluntarily given by the guardian ad litem. Where the guardian *ad litem* of an infant has already given security before the defendant has applied therefor under subdivision 5 of section 3268, the application must be denied and an order of the General Term of the City Court of New York, vacating an order requiring the plaintiff to give security, must be affirmed.

Kamermann v. Eisner & Mendelson Co., 22 Misc. Rep. 554, affirmed.

APPEAL from an order of the General Term of the City Court of the City of New York, affirming an order made at Special Term of said court vacating an order requiring the plaintiff to give security for costs.

Frank V. Johnson, for appellant.

George F. Langbien, for respondent.

BEEKMAN, P. J. We do not agree with the court below that the granting of the order requiring security for costs to be given was irregular because not made upon notice. It seems from the opinion that the General Term considered the case as coming within section 3271 of the Code of Civil Procedure, which in certain cases makes it discretionary with the court whether or not such security shall be required. In the cases there provided for, it is true that the order can be granted only upon notice; but the order in question was made, and properly so, under section 3268 of the Code, which provides that security for costs may be required by the defendant where the plaintiff is (subdivision 5) "an infant whose guardian *ad litem* has not given such security."

In such a case it is well settled that, if the motion therefor be seasonably made, the granting of the order is mandatory, does not rest in discretion and may be made *ex parte*. Wood v. Blodgett, 49 Hun, 64; Churchman v. Merritt, 50 id. 270. If, therefore, the order of affirmance had recited the fact that it was made on the ground that the order in question was irregular because not made upon notice, we should have felt constrained to reverse it, but it fails to do so; and as it is well settled that we cannot

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look into the opinion below for the purpose of finding grounds for reversal, it follows that the order appealed from must be sustained if any ground for its support is discoverable from the papers upon which it was made.

It does appear from the affidavit of the attorney for the respondent that at the time the order requiring security to be given was made the guardian had filed the requisite undertaking, although the attorney for the appellant was not aware of the fact. Under these circumstances, by the terms of the section of the Code above referred to, the appellant was not entitled to such an order, and we must assume that the court below affirmed the order vacating it on that ground. It follows that the order appealed from must be affirmed, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Order affirmed, with costs.

AUGUSTUS H. WHITING et al., Respondents, *v.* THORNDIKE SAUNDERS, Appellant.

(Supreme Court, Appellate Term, April, 1898.)

Agency — Liability of the agent of a disclosed principal where he makes disclosure too late.

While an agent acting for a disclosed principal, in regard to a contract connected with the subject of his agency and within the limits of his authority, is not personally liable unless he clearly indicates an intention to substitute his personal liability for or superadd it to that of his principal, he may incur personal liability where he enters into a contract, *e. g.* for the procuring by brokers of a purchaser, by exchange, of his wife's real estate — without, in the first instance disclosing his principal, and where he never discloses her interest until about the time when the final written contract between the vendor and purchaser is to be executed.

Whiting v. Saunders, 22 Misc. Rep. 539, affirmed.

APPEAL from a judgment of the General Term of the City Court, affirming a judgment of the Trial Term, entered on the verdict of a jury, in favor of the plaintiffs.

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Saunders, Webb & Worcester, for appellant.

S. A. & D. J. Noyes, for respondents.

GILDERSLEEVE, J. The only question presented on this appeal that requires discussion is the claim of defendant that he was acting as agent for his wife, a disclosed principal, and without agreement to bind himself personally, and that he cannot, therefore, be held liable. It is well settled that when the agency is disclosed, and the contract relates to the matter of the agency, and is within the authority conferred, the agent will not be personally bound, unless upon clear and explicit evidence of an intention to substitute, or to superadd, his personal liability for, or to that of the principal. See Hall v. Lauderdale, 46 N. Y. 74. This question of disclosed agency was not specifically referred to in the charge of the trial judge, although he tells the jury that they must satisfy themselves that defendant employed plaintiffs to do the work for him; but, as the jury found in favor of plaintiffs, we must accept their verdict as conclusive on this point, if there is any evidence tending to sustain such a finding. If, however, there is no such evidence, then it was an error of law on the part of the trial judge to refuse defendant's request for the direction of a verdict in his favor, and, upon defendant's exception to such ruling, a question of law is presented to the Appellate Term for consideration. All the other questions in the case were fairly submitted to the jury, and they have decided them, upon competent evidence, in favor of the plaintiffs. With this finding the Appellate Term cannot interfere. The questions of law raised by exceptions to the admission or exclusion of evidence are not of sufficient weight to demand discussion. The only question, therefore, for the Appellate Term to decide is whether there was any evidence to support a finding that defendant acted with undisclosed principal, or, if the agency was disclosed, whether he acted with intention or agreement to substitute, or superadd, his personal liability for, or to, that of his principal. Hall v. Lauderdale, *supra*. It is not for us to weigh the evidence, if conflicting; but it is our duty simply to ascertain if there is any evidence on this point to support the ruling of the trial judge on defendant's motion for the direction of a verdict.

The plaintiffs were real estate agents. The wife of defendant was the owner of certain property at Long Branch and at Verona. The defendant, acting as agent for his wife, placed this property

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in plaintiffs' hands for exchange for city real estate. After considerable negotiation, a sale, by exchange, was effected for some property in Brooklyn, owned by Mrs. Boschen. Plaintiffs' counsel put the plaintiff Richters on the stand, and he testified, with regard to the question under consideration, as follows: "I entered them (the property of defendant's wife) in our books in the name of Thorndike Saunders, the defendant; I did not know anybody else as owner at that time. * * * The contract (of sale or exchange between Mrs. Saunders and Mrs. Boschen by their attorneys) was drawn up in writing. *I drew it up.* I presented it to Mr. Boschen for his wife's signature. He signed it. I presented it to Mr. Saunders. He signed it in my presence, 'Emma Saunders by Thorndike Saunders, attorney.' That was the first intimation that I had that anybody but Thorndike Saunders was interested in these properties in New Jersey. He said his wife owned it, and that he had power of attorney. This was the first time I was apprised that his wife was the owner. I was the subscribing witness, and saw him sign it, and I saw Mr. Boschen sign for his wife." This contract, which plaintiff swears he himself drew up, begins as follows: "Agreement made and entered into, the 21st day of November, 1894, between William C. Boschen, attorney for Martha Boschen, of the City of Brooklyn, party of the first part, and *Thorndike Saunders, attorney for Emma Saunders,* of Asbury Park, N. J., party of the second part," etc.; and the contract clearly shows that Emma Saunders was the principal, not the defendant. On his cross-examination, by Mr. Saunders, the plaintiff swears, "I testified that I did not know that Emma Saunders was the owner of the New Jersey property until after I had seen signed, 'Emma Saunders, per T. Saunders, attorney.' I had no recollection of your mentioning Mrs. Saunders until the time of the contract. I also testified that I drew this Exhibit A (the contract in question), and that I presented it, before I brought it to Mr. Saunders, to Mr. Boschen, and that he signed, 'Martha Boschen by William C. Boschen, attorney in fact;' and that then I brought it to Mr. Saunders, and he signed it, 'Emma Saunders by T. Saunders, attorney.'" Q. "Then, if you drew this agreement before you knew that I was acting as attorney for Emma Saunders, how does it happen that you wrote into the first part of that agreement, 'and Thorndike Saunders, attorney for Emma Saunders, of Asbury Park, N. J.'? Look at it, and answer that question." A. "Mr.

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Saunders, it was about the time the contract was drawn, that I found it out. You told me, *at the time you said you would make the trade*, to go make the contract, to draw it that way. I would like to say this thing occurred three years ago, and I had no idea of having any trouble in the matter.' We had the property on our books in your name. My recollection is that I did not know until I was informed by Mr. Saunders, *when we got ready to make the contract.*" Q. "Is it not true that, when I told you about these properties, that I told you my wife had the equity in the Long Branch property and in the lots in Verona, and that she and I wanted to come to New York, and exchange them for a flat?" A. "I recollect *something* of that conversation, but I cannot recollect it exactly, it is so long ago." Q. "Is that the fact or not?" A. "Not to my knowledge." Q. "You won't deny positively that it is the fact?" A. "No, not positively."

There can be no doubt that plaintiffs were aware of defendant's agency before the contract of exchange or sale, between Mrs. Saunders and Mrs. Boschen, by their attorneys, was executed, or even drawn up; but we are of opinion that there is some evidence tending to show that plaintiffs did not know of defendant's agency until after they had undertaken the employment of finding a purchaser, and had brought the transaction, practically, to a close. The subsequent disclosure of the principal came too late, for a person, contracting as agent, will be personally responsible, where, at the time of making the contract, he does not disclose the fact of his agency, but treats with the other party as being himself the principal; for, in such case, it follows, irresistibly, that credit is given to him on account of the contract. He must disclose the fact that he is acting only as agent, in order that the other party may determine whether he will accept the responsibility of the principal in the transaction. See Ashner v. Abenheim, 19 Misc. Rep. 288; Story on Agency, § 266.

As we have said, it is not for the Appellate Term, on an appeal from the City Court, to weigh the evidence, if conflicting; and, since there is some evidence to sustain the finding of the jury, their verdict will not be disturbed on appeal.

For the reasons above stated, the judgment appealed from should be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

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AUGUST TRENKMANN, Appellant, *v.* MINNIE L. SCHNEIDER, Respondent.

(Supreme Court, Appellate Term, April, 1898.)

Action for rent — Denial of an allegation of nonpayment as affecting the right to open and close — That right is substantial.

Allegations, contained in the complaint in an action to recover rent, to the effect that the defendant has neglected and refused to pay rent for three months and that there is due to the plaintiff a sum stated, are material to the cause of action and, when denied by the answer, entitle the plaintiff to the affirmative of the issue and require a new trial where the important right to open and close has been denied him.

APPEAL by the plaintiff from a judgment of the General Term of the City Court of New York, affirming a judgment entered in the defendant's favor upon the verdict of a jury.

The nature of the action and the facts, so far as they are material, are stated in the opinion.

Edward S. Clinch, for appellant.

Theodore Sutro, for respondent.

GIEGERICH, J. This action was brought to recover rent reserved in a written lease made by the plaintiff to the defendant. The complaint alleges the execution of the lease, the defendant's entry into possession of the demised premises, the performance by the plaintiff of all conditions of the lease, and the defendant's breach, which is alleged in these words: "That the defendant has neglected and refused to pay the rent which became due and payable on the 1st day of May, June and July, 1893, respectively, and there is now due and owing to the plaintiff therefor the sum of $625, with interest * * * ." The answer denies these averments, except the first two, and sets up a constructive eviction by reason of the plaintiff's failure to supply steam heat and steam power covenanted for by the lease.

Upon the opening of the trial the defendant claimed the affirmative, and the trial justice, against the plaintiff's objection and exception, granted the application and gave her the right of opening and closing the case. The defendant argues that the allegations of

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the complaint so denied were not material, and should, therefore, be disregarded, and that, even in the absence of proof showing performance, together with defendant's neglect and refusal to pay the rent alleged to be due, the plaintiff would have been entitled to a direction of a verdict in his favor, upon the uncontradicted allegations of the complaint.

In Lent v. N. Y. & M. R. Co., 130 N. Y. 504-512, the necessity for alleging nonpayment in an action upon contract for the payment of money was discussed and decided adversely to the position contended for by the plaintiff in this action, the court saying, among other things: "If the plaintiff is not required to allege a breach of the contract, or state the amount due, as his verification would cover only the facts alleged, the clerk, under sections 420, 1212 and 1213 of the Code, would be authorized to enter judgment for the whole amount called for by the contract, and this without proof of the amount due thereon. This would be contrary to the whole spirit of the Code, and would require the clerk to presume a fact neither alleged nor proved, viz. — that no payments had been made." And in Cochran v. Reich, 91 Hun, 440, it was held, that the allegations of nonpayment in an action for a breach of a covenant to pay rent reserved in a lease was material, and must be proven when denied.

The case of Hurliman v. Seckendorf, 9 Misc. Rep. 264, cited by the respondent, has no application to the case at bar so far as it relates to the allegation of nonpayment, for the reason that there the making of the lease and the refusal to pay the amount demanded in the complaint were admitted. The allegations of the complaint respecting nonpayment or breaches of contract being, as we have seen, material to the plaintiff's cause of action, it was incumbent upon him to prove them (Lent v. N. Y. & M. R. Co., *supra;* Cochran v. Reich, *supra;* Hicks-Alixanian v. Walton, 14 App. Div. 199), and, having the affirmative of the issue, the plaintiff had the right to open and close the case, and the denial of this right was reversible error. Conselyea v. Swift, 103 N. Y. 604; Lake Ontario Nat. Bk. v. Judson, 122 id. 278; Parrish v. Sun Pub. Assn., 6 App. Div. 585.

The right under consideration is substantial, it not resting in the discretion of the trial judge, and must be determined upon the state of the pleadings as they stood, and not upon admissions or oral withdrawals made during the trial. Parrish v. Sun Pub. Co., *supra.*

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These views dispense with the necessity of considering other points urged by the appellant upon this appeal, and it follows that the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

WILLIAM H. WRIGHT et al., Respondents, *v.* EDWARD DUFFIE, Appellant.

(Supreme Court, Appellate Term, April, 1898.)

Conversion — The liability of an agent for the proceeds of goods sold on commission is upon contract only — In the absence of a prior order of arrest, a District Court of the city of New York cannot in such a case authorize an execution against the body.

An agreement, by the terms of which a person receives from time to time the goods of merchants which he is authorized to sell for their account to customers of his own finding, upon a compensation to him of a percentage of the profits upon his sales, with authority to him to collect and with a subsequent accountability for the proceeds collected, creates a fiduciary relation.

The failure of the agent to account for the proceeds of his sales makes him liable to his principals in an action upon contract, but does not render him guilty of a conversion.

Where the plaintiffs have not procured a prior order of arrest in such an action, proof of such an agreement and of a failure to account does not authorize a District Court of the city of New York to direct a judgment, under the Consolidation Act (Laws of 1882, chap. 410, § 1386), permitting the issue of an execution against the body of the defendant.

APPEAL from a judgment of the District Court of the City of New York, for the eighth judicial district, rendered in favor of the plaintiffs.

Sanders & Gray, for appellant.

George W. Gibbons, for respondents.

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BEEKMAN, P. J. The plaintiffs have sued the defendant for conversion, and judgment has been awarded in their favor against him for the full amount claimed. A judgment in such a case carries with it the right to an execution against the body, and the trial justice has accordingly stated in the judgment, as he was required to do in such a case by section 1386 of the New York City Consolidation Act, that an execution against the body of the defendant is allowed. As no previous order of arrest had been obtained and executed, it is thus manifest that the judgment was placed upon the ground that a case of conversion had been made out, for upon no other theory of the defendant's liability could a body execution issue where a prior order of arrest had not been obtained. § 1394, N. Y. City Consol. Act, and § 2895, Code Civ. Pro. In view of the serious consequences attending the recovery of a judgment on this ground, the plaintiffs must be held strictly to their pleading; and unless a case of conversion has been made out, the judgment must be reversed, although the proofs may show that the defendant is liable for the amount sued for on some other theory.

We are of the opinion that, upon the conceded facts of the case, there was no conversion. The defendant was under an arrangement with the plaintiffs by which he received from them certain goods from time to time, which he was authorized to sell for their account to customers of his own finding. He had authority, also, to collect the proceeds of such sales, for which it was his duty to account to the plaintiffs. His compensation was measured by a certain percentage of the profits which accrued from the sale so made by him. The relation of the defendant to the plaintiffs was a fiduciary one, and his failure to account for the money was a violation of a duty arising out of that relation. It was not a conversion of the proceeds.

In the case of Laverty v. Snethen, 68 N. Y. 522, the court says: "The question as to when an agent is liable in trover for conversion is sometimes difficult. The more usual liability of an agent to the principal is an action of *assumpsit*, or what was formerly termed an action on the case for neglect or misconduct, but there are cases when trover is the proper remedy." It has been held that where an agent is authorized to sell property and collect the proceeds, and refuses or neglects to pay over such proceeds, "an action to hold him upon this liability is an ordinary action on contract," and not one for a conversion. Walter v. Bennett, 16 N. Y. 250; Conaughty v. Nichols, 42 id. 83; Greentree *v.* Rosenstock, 61 id. 583.

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Such, we think, was the form of action which the plaintiffs should have resorted to upon the facts presented by the record. In such a case, where a recovery is had, the plaintiff may also have an execution against the person, provided an order of arrest shall have been previously obtained and executed. § 1394, N. Y. City Consol. Act, and § 2895, Code Civ. Pro. It follows from what has been said that the judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

THE NEW YORK CAB CO., LIMITED, Respondent, *v.* MOSES R. CROW, Appellant.

(Supreme Court, Appellate Term, April, 1898.)

Account stated — Presentation of account.

Mere proof that a creditor had mailed certain bills, of contents not shown, to a debtor on the 1st and 15th of every month, not accompanied by any proof that the account in suit had ever been in any manner presented to him or that he had ever made any agreement to pay it, based upon presentation, is insufficient to support an action as for an account stated.

APPEAL from judgment of the District Court in the City of New York, for the eighth judicial district, in favor of the plaintiff.

Franklin Bien, for appellant.

J. C. Devereaux, for respondent.

BEEKMAN, P. J. This action was brought to recover upon an account stated. The plaintiff, however, was unable to show that the particular account sued on, which was offered in evidence, had ever been presented to the defendant, or that any agreement to pay based on the rendition of such account had ever been made. It was stated by one of the witnesses for the plaintiff that certain bills had been mailed to the defendant on the first and fifteenth days

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of every month, but there was no evidence in the case to show what such bills contained or how they were mailed.

It is true where the creditor has mailed an account to his debtor showing the transactions had between them, and a balance due, that is ordinarily sufficient to make out a *prima facie* case of an account stated, if coupled with proof that after the lapse of a reasonable time no objection to the account was made. The law then presumes that it has been received and examined by the debtor, and that he has acquiesced in its correctness. Upon this an implied promise to pay the amount claimed arises. Lockwood v. Thorne, 11 N. Y. 170; Stenton v. Jerome, 54 id. 480. The creditor, however, must show what the particular account was which he transmitted, and that it was duly forwarded to the debtor.

There is no competent proof in the case before us with respect to either of these essential elements. The plaintiff, therefore, failed to make out a cause of action against the defendant, and the motion made to dismiss the complaint on that ground should have been granted. It follows that the judgment must be reversed, and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and a new trial ordered, with costs to the appellant to abide the event.

LEO A. FELDMAN, Respondent, *v.* MARY J. O'BRIEN, Appellant.

(Supreme Court, Appellate Term, April, 1898.)

Real estate brokers competing to sell the same property — Duty of principal to the unsuccessful broker.

Where a real estate owner puts her property into the hands of competing brokers for sale, that broker is entitled to the commissions who is the procuring cause of the sale. Under such circumstances, where no time is fixed for performance, the owner may, after the lapse of a reasonable time, in good faith sell through one broker without making herself liable to the other, who, up to the time of the sale, had not succeeded in procuring a purchaser.

APPEAL from a judgment of the Eleventh District Court, entered on the verdict of a jury, in favor of the plaintiff.

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Ronald K. Brown, for appellant.

Davis & Gordon, for respondent.

GILDERSLEEVE, J. In the spring of 1897, the defendant was the owner of three houses in this city, to-wit, Nos. 2002, 2004 and 2006 Bathgate avenue. About the month of April, 1897, defendant's husband, J. J. O'Brien, acting as her agent, put these houses into the hands of Brooker & Dunn, real estate brokers, for sale. Some months afterward, O'Brien, as defendant's agent, also put the property for sale into the hands of the plaintiff's assignor, Edward Polak, who was also a real estate broker. About the middle of October, 1897, according to the testimony of Polak's clerk and of plaintiff, a certain Mrs. Riker called upon Polak, and said she wanted to invest some money in real estate. Polak, or his representative, showed her a number of houses, which she does not seem to have liked; and "around October 18th or 20th," according to the testimony of plaintiff, or on November 11th, as appears by defendant's Exhibit 4, Polak, or his representative, showed her the houses in question of defendant, with which she was pleased. Polak communicated with O'Brien, who demanded $6,800 apiece for the three houses, which the said Mrs. Riker refused to give. Afterwards O'Brien agreed to accept $6,400 for each house, but the best offer that Mrs. Riker ever made to Polak was $6,000, which O'Brien refused to accept. About November 1, 1897, Mrs. Riker called on Brooker & Dunn, to see what they had to sell. They gave her a list of houses, including the ones in question, and sent her to look at them. The evidence fairly establishes the fact that at about this time, or shortly afterwards, and before any definite arrangements had been made, each of these two brokers, Polak and Brooker, knew that the property was also in the hands of the other for sale; and O'Brien swears that he said to each of them that he would give the commission to the one who obtained the best price for the property, in which he seems to be corroborated by Brooker, so far as the latter is concerned, and is not specifically contradicted by Polak. Mrs. Riker swears that she told both of the brokers that she would buy from the one who could get the houses for her at the lowest figure. Polak, however, when first on the stand, swears thus: "So he (O'Brien, made me a proposition that he would not allow the property to go to anybody before he had notified me that he would make a reduction in the price; but he said that that

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($6,400) would be the lowest." Subsequent to the giving of this testimony, O'Brien is called to the stand, and, in reply thereto, swears that Polak said: "O'Brien, I will expect you to give me a fair show;" to which he (O'Brien) replied, "There is no favor. Whoever gets the most money for the houses will get the commission." Although Polak is again called to the stand, he does not contradict this testimony of O'Brien. Long and active negotiations went on between the defendant's agent, Mrs. Riker, and the two rival brokers. Polak swears that the lowest offer that he got from O'Brien to sell was $6,400, while the evidence shows that the highest offer he ever got to buy from Mrs. Riker, or anybody else, was $6,000; and he says he kept going from the one to the other, trying to get O'Brien to lower his offer to sell, and Mrs. Riker to raise her offer to buy, but he was not successful in bringing about a meeting of minds or any satisfactory result. In the meanwhile, his rival, Brooker, was also running back and forth between O'Brien and Mrs. Riker, and he finally did succeed in getting her to raise her offer to $6,100 a house. O'Brien, however, declined this offer, saying that he would have to pay broker's fees out of it, and that there would not be enough left to satisfy him. Finally, Brooker offered to buy all of the three houses himself at $6,150 each, and charge O'Brien only $50 a house, as broker's fees for his firm of Brooker & Dunn; so that defendant would receive net for each house $6,100. He frankly confessed that he hoped to be able to transfer the property to Mrs. Riker for $6,150 a house, as she had already offered $6,100; and he said he would run the chance of her refusing. After some hesitation, O'Brien accepted this offer, and closed the bargain. Brooker paid down a deposit on the transaction, and a contract of sale was made. Then Brooker visited Mrs. Riker, and, after some further negotiation, persuaded her to give $18,450 for the three houses, or $6,150 apiece. He thereupon assigned his contract to her, and, on November 30, 1897, a deed of the property from defendant to Mrs. Riker was duly executed.

Plaintiff claims that his assignor, Polak, procured Mrs. Riker as a purchaser, and that he is entitled to his commission of 1 per cent. on the purchase price paid by Mrs. Riker to defendant. The court charged the jury in these words, viz.: "I do not think it necessary, as I address an intelligent jury, to rehearse particularly the evidence that has been introduced here. You must remember that it is necessary for the plaintiff to show by a preponderance of

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proof that he was, or his assignor was, the procuring cause of this sale. If you believe that, the plaintiff here is entitled to a verdict at your hands. The amount that you will find will be 1 per cent. of the purchase price, which has been shown to be $18,450. Upon this charge, the jury brought in a verdict in plaintiff's favor for $184.50.

Although the testimony seems somewhat contradictory and uncertain as to which of the brokers first brought Mrs. Riker into business relations with the defendant's agent, in respect to this property, we will accept the verdict of the jury as establishing this fact in favor of Polak. We are of opinion, however, that the evidence will not sustain the finding of the jury that Polak was the procuring cause of the sale, or that plaintiff is entitled to the commission.

It seems fairly established, from all the evidence, that it was an open contest, between these two brokers, as to which should first bring the parties to an understanding and agreement; and when the principal employs two brokers, the one effects the sale who brings the minds of the parties to meet. See Smith v. McGovern, 65 N. Y. 575. The mere fact that Polak first introduced Mrs. Riker to O'Brien does not entitle him to his commission; for where a broker fails to bring his employer and a proposed purchaser to an agreement, he is not entitled to commissions, because of the fact that a sale is subsequently made to the person introduced by him, in the absence of proof of bad faith on the part of the vendor. See Baker v. Thomas, 12 Misc. Rep. 432. In the case at bar, the evidence will not warrant a finding that O'Brien acted in bad faith. The negotiations between Polak and the two parties O'Brien and Mrs. Riker, were productive of no mutual assent to terms upon the part of the individuals concerned, and it is clearly established that the sale, as finally brought about, was after the completion of negotiations through a broker other than Polak. See Baker v. Thomas, *supra*. All that Polak was entitled to, under his employment, as shown by his own testimony, was a reasonable opportunity to find a purchaser at $6,400 a house; and after he had failed to do so, defendant was at liberty to sell for less, without becoming liable to him for commissions. See Satterthwaite v. Vreeland, 3 Hun, 154, quoted with approval in Sibbald v. Bethlehem Iron Co., 83 N. Y. 385. No time was fixed or designated, during which Polak was authorized to sell at $6,400 a house, so that the defendant, as owner, was bound for no particular period of time; and for

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that reason she was not prevented from making a *bona fide* sale of the houses, at a less sum, without incurring any liability for commissions to Polak. See Satterthwaite v. Vreeland, *supra*, p. 154. In the case of Sibbald v. Bethlehem Iron Co., 83 N. Y. 383, the Court of Appeals, Finch, J., use the following language, viz.: "It follows, as a necessary deduction from the established rule, that a broker is never entitled to commissions for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. * * * If the principal acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest; he has the absolute right before a bargain is made while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor." See, also, Wylie v. Marine Bank, 61 N. Y. 416; and Gerding v. Haskin, 141 id. 519. In the case at bar, there does not seem to have been any formal revocation of Polak's authority or employment, until after defendant had made her contract of sale to Brooker. But this fact is of no importance, since at the time of such revocation, no bargain, through Polak, had been made, Polak's negotiations remained unsuccessful, and the commissions had not been earned. Defendant, therefore, acting in good faith, had an absolute right to revoke Polak's authority, without incurring any liability for commissions. See Sibbald v. Bethlehem Iron Co., *supra*. It is true that, if, in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid, and avoiding the payment of commissions about to be earned, it might be said that the due performance of his obligation by the broker was purposely prevented by the principal. See Sibbald v. Bethlehem Iron Co. But the evidence before us does not disclose any such state of facts in the case at bar. Accepting the testimony of Polak as to his employment by defendant, it in no manner abridged or restrained her own right to sell, unless Polak should sell for the price he was authorized to receive, under the terms of his employment, viz., $6,400 for each house. Polak

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confesses, as we have seen, that he tried to bring about a meeting of minds, seeking to induce Mrs. Riker to raise her offer of $6,000, which was the highest offer he ever obtained, and endeavoring to persuade O'Brien to lower his offer to sell at $6,400; but that his efforts were not successful. By making a sale for $6,400 a house, within a reasonable time, Polak would have become entitled to his commissions; but, as he failed to do that, no right to the commissions was created. See Satterthwaite v. Vreeland, *supra*.

For the reasons above set forth, the judgment appealed from should be reversed and a new trial ordered, with costs to appellant to abide the event.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

SHIRLEY JOHNSON, by RICHARD F. JOHNSON, his Guardian ad Litem, Respondent, *v.* WILLIAM CLARK, Appellant.

(Supreme Court, Appellate Term, April, 1898.)

Betting and gaming — Jewelry delivered by an infant in return for poker chips, subsequently lost in play — False statement of the infant as to his age.

The delivery by an infant of jewelry as a security for or in payment of poker chips, subsequently lost by him in a game in which the receiver of the jewelry took part, evidences a gambling contract and entitles the infant to recover the value of the jewelry and this although he, before entering the game, stated that he was of age.

APPEAL from a judgment of the Eighth District Court, in favor of the plaintiff.

Thomas Bettner, for plaintiff.

John C. Coleman, for defendant.

GILDERSLEEVE, J. The following facts are fairly established by evidence, offered on behalf of plaintiff, viz.:. The defendant was the president and virtual proprietor of a club, where gambling was practiced. Defendant, or his assistant, would sell poker chips to the players, to be used in the game, and, at the conclusion of the

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game, there would be a settlement made, in cash, with the defendant, or his representative. The defendant himself and his assistant usually took part in the game. The plaintiff, a boy of about eighteen years of age, frequented this gambling place, and bought chips from defendant, or his representative, which he lost in the game. Not having any more money, the plaintiff gave to the defendant a diamond stud, and, afterwards, a ring, the value of which jewelry has been fixed, by consent of the parties, at $200, and the defendant advanced to the plaintiff, on such jewelry, poker chips to the amount of about $27, as plaintiff swears, but never gave to the plaintiff a cent in actual money or cash. These poker chips the plaintiff lost in the game, in which, as we have said, defendant himself participated. Defendant, it is true, swears that he never sold plaintiff poker chips, but loaned him actual money, to the extent of about $196.90; but the learned trial justice, upon abundant evidence, has found in favor of the plaintiff's contention, and that finding will not be questioned by the appellate court. There is also a conflict of evidence as to whether plaintiff asserted that he was of age, before defendant allowed him to take part in the game; but, upon this point, also, there is sufficient evidence to uphold the finding of the justice in plaintiff's favor. Even if the preponderance of testimony on this question were against the plaintiff's contention, and even if we assume that the contract or agreement between plaintiff and defendant was not void in law as a gambling contract, still a fraudulent representation, made by an infant, in relation to his age, to induce another person to enter into a contract with him, does not give validity to the contract itself. See N. Y. Building Co. v. Fisher, 23 App. Div. 363.

Appellant also raises a point as to the ownership of the jewels by plaintiff, but the evidence is quite clear that the jewels were given to the plaintiff by his brother, with a sort of indefinite understanding that the former was not to part with them. The title to the jewelry is in the plaintiff, and he has a right to maintain the action.

We are of opinion that the evidence is abundantly sufficient to support the finding that the arrangement which existed between the parties, in virtue of which the plaintiff delivered to the defendant the jewelry in question, was a gambling contract, and, therefore, void in law. See 1 R. S. 662, §§ 8, 9, 14 and 16; Mount v. Waite, 7 Johns. 434; Decker v. Saltsman, 1 Hun, 421; affirmed, 59 N. Y. 275; Ransom v. Vermilyea, 11 N. Y. St. Repr. 683; Meech v.

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Stoner, 19 N. Y. 27; Collins v. Ragrew, 15 Johns. 5. The jewelry was given either as security for, or in payment of, poker chips, which were lost in a game played in defendant's gambling place, and in which game defendant himself took part; and plaintiff is entitled to recover back the value of such jewels. See Meech v. Stoner, *supra;* Ransom v. Vermilyea, *supra;* Collins v. Ragrew, *supra;* 1 R. S., *supra.* It is well settled that the loser of money by gaming may recover back the amount in an action for money had and received. Collins v. Ragrew, 15 Johns. 5.

For the reasons above stated, the judgment appealed from should be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

HELENE STEIN, Respondent, *v.* ISAAC L. RICE, Appellant.

(Supreme Court, Appellate Term, April, 1898.)

1. **Landlord and tenant — Right to abandon — Waiver.**

   A tenant must exercise his option to abandon premises within a reasonable time and a delay of six weeks, after he discovers that the water supply is defective, is too great.

2. **Same — Constructive eviction.**

   Where a landlord makes no representations to his tenant in regard to the conditions of premises at a seashore resort where the entire water supply is at times inadequate, an entire failure for three days of the water supply of the premises, produced by causes over which the landlord has no control, does not amount to a constructive eviction nor justify the tenant in abandoning.

3. **Same — An eviction, occurring after rent payable in advance is due, is not a defense to an action for the rent.**

   An eviction, which will bar an action for rent, must take place before the rent becomes due; and where the rent is payable in advance upon August 1st, a constructive eviction, caused by the failure of the water supply on August 17th, is not available as a defense.

APPEAL from a judgment of the Eleventh District Court in favor of the plaintiff and against the defendant Isaac L. Rice.

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Nathan Bijur, for appellant.

Lester & Mettler, for respondent.

GILDERSLEEVE, J. Plaintiff, through her husband and agent, rented her cottage, at Avon-by-the-Sea, to the defendant for the summer season of 1897. The rent was to be $500, one-half payable on July 1st, and the other half on August 1st. Defendant, before hiring the place, had been assured by Mr. Stein, the plaintiff's husband and agent, that the place was healthy; the defendant's wife, Mrs. Julia Rice, had visited the place and found it satisfactory. She saw two bathrooms, one on the second floor and one on the third floor, and concluded that the water supply was sufficient, although nothing on this subject had been said either by the defendant or his wife, or by the plaintiff or her husband or her caretaker, Leigh, who showed the defendant's wife over the place. On July 1st, the defendant's family moved into the cottage, and on the same day defendant paid his first installment of rent, *i. e.*, $250. Upon so moving in, they found that, owing to plaintiff's failure to pay the water tax or rent, no water had been turned on. The caretaker, Leigh, got some water for them in cans or pails from a neighboring hydrant; and, on July 3d, the water was turned on, as plaintiff had paid the water rent out of the money paid to her by defendant as the first installment of rent. There does not seem to have been any more trouble until towards the middle of August, about the 11th or 12th of that month, when the supply began to fall off, and on or about the 14th of August, a general water famine sat in at Avon-by-the-Sea. The defendant's family was supplied to a certain extent with water from the hydrant, which water was brought in cans or pails by the servant, Cora Whitiker, and by Leigh, the plaintiff's caretaker. The defendant's family was put to very considerable inconvenience, by reason of the water famine; although the evidence does not warrant a finding that the health of the family was injured. In fact, Mr. Rice particularly says that none of the family were sick, and that he was merely apprehensive of sickness, but that there was no positive sickness. It also appears that they had enough water to drink, but not sufficient for washing or for cooking during these three days of famine, *i. e.*, from August 14th to August 17th. Mrs. Rice swears that the closets were in a frightful condition, but it does not appear that they could not have obtained sufficient water

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from Leigh, or even from the ocean, to have kept the closets clean. On the 17th of August, the defendant vacated the premises, and plaintiff brought this action to recover the balance of $250, due on August 1st, on the agreed rent of $500 for the season. It further appears that on the 18th of August, the day after defendant had vacated the premises, the water company attached another pump to the water plant, and gave a better supply to all of the houses, including the one in question.

Defendant claims that the plaintiff's agent suppressed a material fact in not letting defendant know of the shutting off of the water previous to July 3d, and at the time of the making of the agreement; and also in not warning defendant of the likelihood of an insufficient water supply in August. The first objection must be held to have been waived, since the defendant continued in possession of the premises for some six weeks after the water had been turned on again, on July 3d. A tenant must exercise his option to abandon, within a reasonable time after discovering the untenable condition of the premises. See Copeland v. Luttgen, 17 Misc. Rep. 604. As to the second point, the principle of law may be stated as follows, viz.: Where the lease contains no covenant on the part of the lessor that the premises are in good condition, or that he will put or keep them so, a covenant may not be implied that the dwelling is without inherent defects, rendering it unfit for residence. But where the lessor, knowing, at the time of the making of the lease, of the existence of the secret defects or conditions, rendering the building unfit for residence, fraudulently represents to the lessee that they do not exist, or fraudulently conceals their existence, and the lessee abandons the house because thereof, he will not be held liable for the rent subsequently accruing. See Daly v. Wise, 132 N. Y. 306. In the case at bar, it appears that for some years previous to the letting of the premises to the defendant, there had been a falling off of the water supply at Avon-by-the-Sea, during the month of August; but the evidence does not warrant a finding that such usual falling off of the water supply amounted to such a water famine as that which occurred in August, 1897. It is not denied that plaintiff's agent knew of this usual decrease of the water supply during the month of August, and that he said nothing on the subject to the defendant. On this point he swears: "Q. How many seasons did you pass at Avon, in this cottage? A. Three seasons. Q. Did the water supply ever totally run out? A. Never. Q. Was there ever a lowness

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in the water supply? A. There was sometimes. Q. Just state how great it was. A. During the middle of the day, during the month of August, the water is ordinarily low, and sometimes run down so it would not get up to the third floor, where we had a sink; but during the mornings, evenings and nights there was always a sufficient supply of water." He swears, on cross-examination, that he never knew the water to give out on the second floor, or get low on the bottom floor. The caretaker, Leigh, swears: "Q. Generally, during the month of August, the water in any of those houses does not go beyond the first floor? A. No; not in the middle of the day. At night time it does better. Q. Had this house the same accommodations as any of the houses in that place? A. Yes." The defendant himself swears: "Q. Did they (plaintiff's agents) make any efforts to remedy it (the water famine)? A. It could not be remedied. It was the trouble in the water supply of the whole town."

We do not think that the evidence will sustain a conclusion that there was fraud which would justify a rescission of the lease, or that the plaintiff or her agents should have foreseen the water famine of August, 1897, and warned defendant thereof. Defendant particularly admits there was no actual representation on this point, for he thus testifies: "Q. Did the plaintiff or Mr. Stein ever represent to you that the water supply was continuous in volume throughout the summer? A. I do not think so." The law will not imply a covenant or agreement in the lease as to conditions not under the control of the lessor, and with reference to which he and the lessee being ignorant, neither could be supposed to have contracted. The lessee of real property must run the risk of its condition, unless he has an express agreement on the part of the lessor in relation thereto. See Franklin v. Brown, 118 N. Y. 110.

The defendant also raises the point that the husband represented himself as the owner of the property, and that this constituted a fraud upon the defendant. The plaintiff's husband, however, explicitly denies this. He is asked: "Q. Did you not state to Mr. Rice that this was your cottage? A. No; I did not. I told him it was the cottage of my wife." Without stopping to consider the value of the point, even assuming that the statement was made, it is sufficient to say that the justice must be deemed to have found the fact in favor of the plaintiff, and his conclusion will not be disturbed on appeal.

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The defendant also refers us to the case of Smith v. Marrable, 11 M. & W. 5, an English decision of 1842, where it was held that the tenant was justified in leaving a furnished house infested with bugs. We do not regard this case as very applicable to the case at bar, in the first place, and, in the second place, the correctness of the doctrine there laid down has been questioned by our Court of Appeals, in the cases of Franklin v. Brown, 118 N. Y. 110, and Daly v. Wise, 132 id. 306.

There is another aspect of the case at bar which merits notice. Even should we assume that, although there was no fraud, the failure of the water supply amounted to a constructive eviction, still an unlawful eviction is not a defense to an action brought for the recovery of rent due and payable before the eviction. See Cole v. Sanford, 77 Hun, 199. By the terms of the agreement in question, as we have seen, the balance of rent, *i. e.*, $250, was due and payable on August 1st; whereas, the supposed eviction did not occur until August 17th. The rule is that to bar an action for rent, the eviction must take place before the rent becomes due; and whether it became due, by special agreement, in advance, or, without such agreement, by the expiration of the term, does not vary the rights of the lessor. See Gugel v. Isaacs, 21 App. Div. 504, An eviction on the 17th of the month is no defense to an action for rent which accrued on the first of said month. See Johnson v. Barg, 8 Misc. Rep. 307. In the case of Giles v. Comstock, the Court of Appeals held that to render an eviction of a tenant a valid defense against the landlord's claim for rent, it must take place before the rent falls due; and the rule is the same, although the rent is payable in advance and the eviction occurs before the expiration of the period in respect to which the rent claimed accrues. Giles v. Comstock, 4 N. Y. 270. This is an old decision, but the rule there stated does not seem to have been modified by any subsequent adjudication. See Gugel v. Isaacs, *supra;* also, Cheesebrough v. Lieber, 18 Misc. Rep. 459.

There is no other point of sufficient importance to require discussion. For the reasons above stated, the judgment is affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

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CHARLES J. SMITH, Respondent, *v.* ALBERT HARTOG, Appellant.

(Supreme Court, Appellate Term, April, 1898.)

Conversion — Demand — Refusal, by requiring a receipt — Rejected tender of chattel, made after the conversion had occurred — Mitigation of damages.

In an action for a conversion it appeared that the defendant, the receiver of a firm, took possession of the plaintiff's horse because his son, who was a partner in the firm, told the defendant that it was firm property. The son afterwards told the defendant that the horse belonged to the plaintiff. The defendant, upon demand made, offered to surrender the horse to the plaintiff if he would sign a receipt for it, which stated that it was claimed by the plaintiff as his property. The plaintiff refused to sign. The defendant subsequently tendered the horse but the plaintiff declined to accept.

Held, that the unauthorized dominion which the defendant exercised over the horse, however slight in extent, constituted a conversion. That the demand, necessarily made where possession had been lawfully acquired, was sufficiently refused by the defendant's insistence upon a receipt as a condition of delivering to the plaintiff his own property. That damages could not be mitigated by a tender, made after a conversion, which was not accepted.

APPEAL from a judgment of the Sixth District Court, in favor of the plaintiff.

Weekes Brothers, for appellant.

B. L. Brandner, for respondent.

GILDERSLEEVE, J. On June 16, 1897, plaintiff was the owner of a certain horse, which he had loaned to the firm of Smith & Woolsey, the senior member of which firm, Malcolm Smith, was the son of plaintiff. On June 14, 1897, the defendant was appointed receiver of said firm, and on or before June 16th, duly qualified as such. On said 16th of June, defendant, with said Malcolm Smith and his lawyer, went to the place of business of said firm to take possession of the assets thereof. In front of said premises were four horses, which said Malcolm Smith pointed out

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as the property of the firm. Defendant thereupon took possession of said horses, and placed them in a stable. One of these horses belonged to the plaintiff, who, as we have said, had loaned it to the firm some time previous to the day in question. On July 7th, the plaintiff made a demand for the return of his horse. Defendant knew that the horse had belonged to plaintiff, and his only reason for supposing that the firm had acquired ownership was the fact that it was found among other horses belonging to the firm, and that Malcolm Smith had pointed out all the horses together as being the property of the firm. Upon plaintiff's demand, inquiries were made of Malcolm Smith, who acknowledged that the horse belonged to plaintiff, and told defendant to deliver it to him. Thereafter, defendant offered to return the horse into the possession of plaintiff, if plaintiff would sign the following receipt, viz.: "Received from Albert Hartog, receiver, one gray horse, claimed by me as my property." This receipt plaintiff refused to sign, and defendant kept the horse. Plaintiff, in November, 1897, brought this action for a conversion, and the justice fixed the value of the horse upon sufficient evidence, at $50, and gave judgment for the plaintiff.

It is well settled that any unauthorized exercise of dominion over the property of another is a conversion, without regard to the intent with which the act is done; and if the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it, the latter is liable for a conversion. See Roe v. Campbell, 40 Hun, 49. There can be, therefore, no doubt that the defendant has been guilty of a conversion, under the state of facts above set forth, which have been established by defendant's own testimony. It must be held, however, that, under the circumstances above disclosed, the property came lawfully into the defendant's possession; and, therefore, there must have been a demand and refusal in order to sustain an action for conversion. See Bates v. Conkling, 10 Wend. 389; Hall v. Robinson, 2 N. Y. 293; Sluyter v. Williams, 37 How. Pr. 109; Spoor v. Newell, 3 Hill, 307. Of the demand there is no question, but appellant claims that the evidence will not warrant a finding that there was a refusal, since defendant tendered the horse back, on condition that plaintiff signed a receipt; but, upon plaintiff's refusal to do so, defendant kept the horse. We do not think that plaintiff was under any obligation to sign this receipt, in order to recover his property. The rule is that there must be an

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absolute denial of the plaintiff's right, or the qualification or excuse must be unreasonable, or made in bad faith. See Monnot v. Ibert, 33 Barb. 26. It seems to us that defendant's excuse for not delivering the horse, *i. e.*, the refusal of the plaintiff to sign the receipt, was entirely unreasonable and insufficient. As we have above stated, the only reason for the defendant's supposing the horse to have belonged to the firm was the fact that Malcolm Smith had given him to so understand; and yet, although the same Malcolm Smith told him, upon the plaintiff's making his demand, that the horse did not belong to the firm, but did belong to the plaintiff, and although he himself knew that the horse had belonged to the plaintiff, still he refused to give the horse up, unless the plaintiff signed a receipt to suit him. Had he wished to protect himself, he could have delivered the horse in the presence of witnesses. What plaintiff's reason for this refusal to sign the receipt was, does not appear; indeed, plaintiff makes no reference to any such demand for a receipt, although he does not specifically deny defendant's allegation in reference thereto. Plaintiff simply swears that defendant promised to return the horse, but did not do so; which would be evidence of a conversion, even without a demand and refusal. See Durell v. Mosher, 8 Johns. 445. It must be held that the fact of the demand and refusal is fully established, and defendant has been guilty of a conversion, and is liable therefor.

There is another point, which may, perhaps, merit notice, since it has been referred to by counsel; although it does not seem to have much importance in view of the facts established by the evidence in the case at bar. If we assume from the testimony, which is not very clear as to dates, that defendant, when plaintiff made his demand and Malcolm told him to deliver the horse, at first refused absolutely to accede to the plaintiff's demand, but that some time afterwards, upon reconsidering the matter, or, in his own words, "rather than have any dispute about the horse," sent the horse to plaintiff, and made a tender of the same, and that plaintiff's refusal to sign the receipt amounted to a refusal to accept the horse, still the defendant would be liable. In an action for the conversion of personal property, the right of the plaintiff to recover the full value of the property is not affected by proof of an unaccepted tender of the property, made by the defendant, after the conversion, and before the commencement of the action. See Carpenter v. Manhattan Life Ins. Co., 22 Hun, 47. In an action for conversion, the defendant can only claim a mitigation

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of damages, because of a return of the property, where the owner has accepted its return, or has assumed dominion over it as owner. See People v. Bank of North America, 75 N. Y. 549. Upon the assumption of facts, here indicated, the conversion would have been complete, upon defendant's refusal to comply with plaintiff's demand. See Carpenter v. Manhattan Life Ins. Co., *supra*.

Appellant contests the value put upon the horse by the trial justice, but, as we have already indicated, we think the evidence justifies his finding in this respect.

For the reasons above stated, the judgment, so far as assailed on this appeal, should be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

THE AMERICAN GROCERY CO., Respondent, *v.* THE STATEN ISLAND RAPID TRANSIT RAILROAD CO., Appellant.

(Supreme Court, Appellate Term, April, 1898.)

Carriers — Reasonableness of a proviso in a bill of lading that a claim for loss must be made in thirty days.

A condition, contained in a bill of lading issued by a common carrier, and providing that "claims for loss or damage must be made in writing to the agent at the point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event," is a reasonable limitation; and where no claim for a loss, resulting from an erroneous delivery, is made by a consignor in thirty days, it is precluded from recovering against the carrier.

APPEAL by the defendant from a judgment of the Municipal Court of the City of New York, borough of Manhattan, first district, rendered by the justice thereof without a jury. The opinion states the nature of the action and the material facts.

Lester W. Clark, for appellant.

Cromwell G. Macy, for respondent.

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GIEGERICH, J. This action was brought to recover the value of certain packages of liquors consigned by the plaintiff to one William Benz, at Ridgewood Hotel, Pleasant Plains, Staten Island, New York, and which the defendant, through error, delivered to a person other than the consignee. The goods were delivered by the plaintiff to the defendant at the city of New York, on the 15th day of January, 1897. The bill of lading, among other things, provides:

"Claims for loss or damage must be made in writing to the agent at the point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event."

It is conceded that no claim for the loss of the property was made until sixty days after the delivery thereof to the defendant. The defendant contends that such stipulation was a condition precedent to its liability and that unless complied with no recovery can be had.

Common carriers may, by contract, limit their common-law liability when the limitation is reasonable in its character. Jennings v. G. T. R. Co., 127 N. Y. 438, 451, and citations.

And a provision similar to the one under consideration has been held to be reasonable. Smith v. Dinsmore, 9 Daly, 188; Hirshberg v. Dinsmore, 12 id. 429; Kaiser v. Hoey, 1 N. Y. Supp. 429; Lewis v. Great Western Ry. Co., 5 Hurl. & Norm. 867; Express Co. v. Caldwell, 21 Wall. 264; Weir v. Express Co., 5 Phia. 355, opinion by Sharswood, J.; Southern Ex. Co. v. Hunnicutt, 54 Miss. 566; Black v. W. St. L. & P. R. Co., 111 Ill. 351.

In the case of Lewis v. Great Western Ry. Co., *supra*, the condition in the bill of lading was that no claim for deficiency, damages or detention would be allowed unless made within three days after the delivery of the goods, nor for loss unless made within seven days from the time they should have been delivered. This was held to be a reasonable condition. And in the case of the Express Co. v. Caldwell, *supra*, Mr. Justice Strong, who delivered the opinion of the court, comments upon that case and says that (p. 270) "the onus was imposed upon the shipper of ascertaining whether the goods had been delivered at the time they should have been, and in case they had not, of making his claim within seven days thereafter." The case at bar seems to come within the principles of the decisions above referred to, and as the condition under

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examination was not complied with, the plaintiff has no right of action against the defendant.

The judgment must, therefore, be reversed and a new trial ordered in the Municipal Court in the district in which the action was brought, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered in the Municipal Court, with costs to appellant to abide event.

SCHUYLER C. STROCK, Respondent, *v.* THE BRIGANTINE TRANSPORTATION CO., Appellant.

(Supreme Court, Appellate Term, April, 1898.)

Accord and satisfaction — Acquiescence, by silence of the debtor, in the creditor's application, as in part payment, of money sent by the debtor as in full settlement.

After a dispute had arisen in regard to items of freight upon goods sold, the debtor mailed the creditor a check for a sum of money "in settlement of the accompanying bills and statement, which kindly receipt and return promptly". Five days later the creditor answered the letter, denied that the payment was in full settlement of the bills, said he had credited the check as a part payment, asked an itemized statement (including verified freight bills paid by the debtor) of items deducted in order that he might check them over, returned the bills sent and demanded payment in full. The debtor never answered this letter.

Held, that the defense of an accord and satisfaction, interposed to an action brought for a balance due upon the goods sold, could not be maintained.

That, as no mutually satisfactory final settlement had ever been made between the parties, the creditor was entitled to infer from the debtor's failure to reply to his letter that it acquiesced in the action of the creditor in treating the check merely as a part payment.

APPEAL by the defendant from a judgment of the District Court in the City of New York, for the second judicial district, rendered in favor of the plaintiff, by the acting justice thereof, without a jury.

The nature of the action and the material facts are stated in the opinion.

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Edward Russell, for appellant.

Henry R. Twombly, for respondent.

GIEGERICH, J. This action was brought to recover a balance claimed by the plaintiff to be due for goods, wares and merchandise, consisting of wooden poles, ties and lumber. The answer denies any indebtedness, alleges payment, and sets up an accord and satisfaction, together with an agreement between the parties whereby the goods were to be delivered at the Belmont Station in the City of Philadelphia, State of Pennsylvania, and that the defendant was to be allowed on account of the purchase price all moneys paid for freight and charges thereto, and claiming that after such deduction nothing remains due to the plaintiff.

There was a sharp conflict of testimony upon the question whether, as claimed by the defendant, the timber should be delivered at the Belmont Station; or whether, as contended by the plaintiff, the former was bound to receive it at any station in Philadelphia. A finding either way would have been warranted, and, the justice having found for the plaintiff upon a conflict of evidence, we should not disturb his conclusion respecting this subject in the absence of the elements which are requisite to a review of the facts. Lynes v. Hickey, 4 Misc. Rep. 522.

Another question presented by this appeal is whether an accord and satisfaction was so conclusively established by the evidence as to leave no question of fact for the trial justice upon the subject.

The evidence regarding this question was substantially as follows: Prior to the 28th day of July, 1897, Mr. Cook, the defendant's president, stated to the plaintiff that he would not pay him any more than the sum of $493.28, to which the plaintiff replied that he would not accept that sum as full payment. The language used by Mr. Cook was: "I will make out an order on my treasurer for the amount. You can accept that or do as you ——— please." Whereupon the plaintiff said that he would accept it only as partial payment. On July 30, 1897, the treasurer of the defendant addressed a letter to the plaintiff in the following words: "I inclose herewith check for $493.28, in settlement of the accompanying bills and statement, which kindly receipt and return promptly." The statement thus inclosed showed according to the claim of the defendant that the amount due was $493.28.

On the 4th day of August of the same year the plaintiff addressed a letter to the treasurer of the defendant in which he ac-

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knowledged the receipt of his letter with the inclosures, and then proceeds to say: "You say it is in full settlement of the bills, which is incorrect. The amount is insufficient, and I have, therefore, placed it to your credit as part payment on account only pending full settlement. Kindly send me an itemized statement, together with receipted freight bills, etc., of the items deducted, in order that I may check them over. You have submitted absolutely nothing as authority for making deduction from my invoice. I return bills to you pending payment in full. I have stated my position in this matter in a letter to Mr. George H. Cook, pres. of your company, under date of July 28th, and will mail you a copy if desired. I ask, therefore, that you make full settlement in accordance with the contents of that letter, as the whole account is past due." To this letter no response was ever made.

This constitutes the entire evidence in the case upon this subject, and as the defendant relies upon it in support of his plea of an accord and satisfaction, the only question presented for our consideration is whether in any aspect of the case the trial justice was justified in holding as he did that this defense had not been made out. The law upon the subject has recently been a matter of much discussion, and the question is often a nice one, owing not so much to any uncertainty as to the fundamental principles, which are reasonably well established, as to the difficulty in applying them to the ever-varying facts which individual cases present. Fuller v. Kemp, 138 N. Y. 231; Nassoiy v. Tomlinson, 148 id. 326; Rothschild v. Mosbacher, 26 App. Div. 167.

In the case of Fuller v. Kemp, *supra*, the court says (p. 238): "In Preston v. Grant, 34 Vt. 201, the Supreme Court of Vermont very sharply, and, as we think, correctly, defined the line of discrimination which separates this class of cases from those where the defense fails. Judge Pierpont, delivering the opinion of the court, at p. 203, says: 'To constitute an accord and satisfaction, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom, that if he takes it, he takes it subject to such condition. When a tender or offer is thus made, the party to whom it is made has no alternative but to refuse it, or accept it upon such condition. If he takes it, his claim is canceled, and no protest, declaration or denial of his, so long

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as the condition is insisted on, can vary the result. The principle is too well settled in this state to require 'either argument or the citation of authorities to support it.'"

If in the case at bar the defendant had answered plaintiff's letter, stating that it still insisted upon the payment of the money in question in full satisfaction of plaintiff's claim, and the plaintiff had then persisted in retaining the money which had been sent him, there can be no doubt of the fact that there would then have been a complete accord and satisfaction, which would have barred any recovery in this action. The only question then for us to consider is whether, under the circumstances of the case, the defendant was not bound to advise the plaintiff that he could not accede to his proposition. There can be no doubt about his good faith in the matter. The record shows the existence of a *bona fide* dispute between these parties with respect to the amount of freight which under the contract between them was properly chargeable to the plaintiff. The freight in question had been paid by the defendant, and the plaintiff naturally went to its officers for the purpose of an accounting and a liquidation of the amount to which he was entitled upon a statement of the transactions between them. The account that was presented to him upon which the defendant stood did not give the particulars of the items in such form that the plaintiff was able to determine their accuracy, although apparently he knew that he was entitled to a larger amount than the bills shown by the defendant. He was ignorant of the details upon which the defendant apparently relied in support of its account, and it was under these circumstances that he stated to Cook, the defendant's president, that he would not accept the balance shown him in full of the account, but only as a partial payment. Although Cook did not accede to this proposition and his refusal was followed by the letter above quoted from the treasurer of defendant, it was quite reasonable for the plaintiff to infer from the failure of the defendant's treasurer to answer his letter of August 4th that his appropriation of the money as a partial payment, and not as a settlement in full was acquiesced in. There had been no satisfactory accounting between the parties; the plaintiff was still asking for an itemized statement with proper vouchers to the end that a satisfactory and accurate adjustment of their transactions might be had; and when in connection with this he stated that he placed the amount which had been sent him to the credit of the defendant "as part payment on account only pending full settle-

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ment," the defendant should have advised him in return that the question was no longer an open one; that they would go no further in the matter, and would insist upon his acceptance of the amount which had been sent to him in full settlement, or not at all. Had this been done, doubtless the plaintiff would have returned the amount; and if he had done so, the defendant, we think, would have been obliged to accept it, or failing to do so, could not then have established an accord and satisfaction. It was a matter of fair deduction from the evidence that the failure of the defendant to reply to his letter justified a belief on the part of the plaintiff that his proposition was acceded to.

In the case of Fuller v. Kemp, *supra*, the court says (p. 238): "To make out the defense, the proof must be clear and unequivocal, that an observance of the condition was insisted upon, and must not admit of the inference that the debtor intended that his creditor might keep the money tendered, in case he did not assent to the condition upon which it was offered."

We do not think that the proofs in this case respond to the test thus given. It cannot be said that an inference is not permissible that the defendant acquiesced in the disposition of the matter which was made by the plaintiff. In the case last quoted, where the creditor wrote to his debtor, stating that he declined to accept a check in full payment, but had appropriated it as a partial payment of his claim, the court intimates (p. 236) that had the debtor remained silent, it might have been presumed that he assented to the use which the creditor had made of the check.

In the case of Nassoiy v. Tomlinson, *supra*, where a similar letter was sent by the creditor, accepting as a payment on account a check which had been forwarded to him in full settlement of his claim, the debtor promptly replied, refusing his assent, and insisting that his debt was paid. The court held that the declaration of the creditor was "*ex post facto*, and could have no effect unless acquiesced in by the defendants," and the reply of the latter is referred to in refutation of any possible claim that there was any such assent.

There may be cases where the creditor would not be justified in assuming an acquiescence from a failure to reply to such declarations. We think, however, that in the case at bar the letter of the plaintiff referred to called for an answer, and that it cannot be said, considering all the circumstances of the case, that he was not entitled to assume that his proposition was acquiesced in because of the defendant's failure to reply.

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We have also examined, with great care the other exceptions taken at the trial, and the points raised on this appeal, and fail to discover the existence of any substantial error, which would require a reversal of the judgment.

The judgment should, therefore, be affirmed, with costs.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.

EDWARD V. THORNALL, Appellant, *v.* PETER F. TURNER, Impleaded with Another, Respondent.

(Supreme Court, Appellate Term, April, 1898.)

1. **District Courts of New York city — Practice in opening defaults, since the charter of 1897 — Statement of grounds of order.**

   The former practice as to opening a default in a District Court of New York city still controls in the Municipal Court, created by the charter of 1897, and an order of such a nature is fatally defective where it fails to state the grounds upon which it was granted.

2. **Same — Affidavit of merits.**

   It is now, as formerly, a condition of granting such an order that an affidavit of merits be filed and served, or, if this has already been done, that proof thereof be made upon making the motion.

3. **Same — Costs on reversal of an order opening a default.**

   Where the plaintiff succeeds in reversing such an order, he is entitled to tax $30 costs.

APPEAL by the plaintiff from an order opening a default made by the acting justice of the Municipal Court of the city of New York, borough of Manhattan, tenth district.

The opinion states the material facts.

Clarence E. Thornall, for appellant.

William G. McRae, for respondents.

GIEGERICH, J. The plaintiff seeks a reversal of the order opening the default of the defendant Turner and setting aside the judgment entered thereon, upon three grounds: First, that the

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order does not recite and contain the grounds for the granting thereof; second, that the moving papers fail to show a satisfactory excuse for the default; third, that an affidavit of merits was not presented.

As to the first point, it was held by the Appellate Term, in Colwell v. Devlin, 20 Misc. Rep. 355, that the power to open a default and set aside a judgment entered thereon in a District Court action was purely statutory (Laws of 1896, chap. 748, amending § 1367 of the Consolidation Act), that it must appear from the order that the statute has been complied with, and that an order which does not recite and contain the grounds therefor is fatally defective. The section of the Consolidation Act referred to was not included in the Greater New York charter. See Birdseye's work on the latter subject, pp. xliv and xlv. But, pursuant to section 1369 of said charter, the practice relating to the opening of defaults which obtained in District Courts on the 31st day of December, 1897, applies to, controls and governs the same in the Municipal Court and the branches thereof in each district. As the provisions of said act, just referred to, are still in force it follows that the principle of the decision in the last cited case is decisive of the question under consideration.

As to the second point, I am of the opinion that the absence of the said defendant was satisfactorily explained, the same being due to the serious illness of his wife, which resulted in her death two days later.

The third question presented relates to the filing of an affidavit of merits. Rule 23 of the General Rules of Practice which applies to the Municipal Court (Greater New York Charter, § 1377), in part provides: "Where an affidavit of merits has once been filed and served no other shall be necessary, but on making a motion such service and filing must be shown by affidavit." This is in harmony with the prevailing practice requiring an affidavit of merits in order to open a judgment taken by default (1 Ency. Pl. & Pr., p. 352, and citations; Ludlow v. Coit, 3 Law Bull. 102), and, not having been complied with in the present case, it follows that the order should be reversed for this reason, as well as for the defect therein heretofore pointed out.

There remains to be considered the question of costs. This question was carefully considered by the Appellate Term in Colwell v. Devlin, 20 Misc. 616, 617, and again in Szerlip v. Baier, 21 id. 692, 694, and it was held that where the appellant succeeds in

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reversing the order opening a judgment he is entitled to $30 costs. A careful examination of the authorities induced by the strong plea made upon the argument by counsel for the respondent to be relieved from the payment of full costs on appeal, because of his client's misfortune and the smallness of the amount involved, but confirms the views expressed by the court in these cases, and from which it appears that we have no discretion in the matter.

For these reasons, to my mind, the order should be reversed, with costs, and the motion remitted to the court below for further hearing to be brought on upon at least five days' notice, with leave to the defendant Turner to file and serve an affidavit of merits.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Order reversed, with costs, and motion remitted to court below for further hearing upon at least five days' notice, with leave to defendant Turner to file and serve an affidavit of merits.

KIVE SIEGEL, Appellant, *v.* SARAH COHEN, Respondent.

(Supreme Court, Appellate Term, April, 1898.)

District Courts of New York city — Jurisdiction as to creditor's action, under Code of Civil Procedure, § 1837 — Requisites of proof.

Semble, that there is grave doubt whether a District Court of the city of New York has jurisdiction to entertain an action, brought under section 1837 of the Code of Civil Procedure, by a creditor, "against the surviving husband or wife of a decedent and the next of kin of an intestate, or the next of kin of legatees of a testator, to recover, to the extent of the assets paid or distributed to them, for a debt of the decedent, upon which an action might have been maintained against the executor or administrator".

Assuming that jurisdiction exists, the plaintiff must fail in his action where he has not shown that there has been any distribution of the assets of the estate of the deceased debtor, nor any payment of any portion of the same to the defendant, or that any letters of administration have ever been issued, upon the estate of the deceased.

APPEAL from a judgment of the District Court of the City of New York, for the fourth judicial district, dismissing the complaint, with costs.

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Abraham H. Sarasohn, for appellant.

Henry L. Franklin, for respondent.

Per Curiam. It may, at least, be said that there is grave doubt whether the court below had any jurisdiction to entertain this action, which is brought under section 1837 of the Code of Civil Procedure, authorizing an action to be maintained in the manner prescribed in the article, of which the section in question is a part, "against the surviving husband or wife of a decedent and the next of kin of an intestate, or the next of kin or legatees of a testator, to recover, to the extent of the assets paid or distributed to them, for a debt of the decedent, upon which an action might have been maintained against the executor or administrator." By subdivision 3 of section 2863 of the Code, a justice of the peace is prohibited from taking cognizance of such an action, and by section 3215 of the Code, subdivision 1, the same limitation seems to be imposed upon the District Courts in this city. The point, however, was not made upon the trial, nor, in fact, upon the argument of this appeal, and under the peculiar provisions of section 1382 of the New York City Consolidation Act, it must be deemed to have been waived.

We think, however, that the judgment dismissing the complaint should be affirmed on the ground that the appellant, irrespective of the jurisdictional question, has not made out a cause of action entitling him to a recovery under his complaint. He has not shown that there has been any distribution of the assets of the estate of the deceased debtor, or that there has been any payment of any portion of the same to the respondent, or, indeed, that any letters of administration have ever been issued upon the estate of the deceased. At most, all that can be inferred from the testimony is that the respondent, without any legal sanction, has appropriated the entire assets of the estate to her own use. This, however, does not bring the case within the section referred to, nor entitle the appellant to a recovery under the form of action to which he has resorted. The judgment must, therefore, be affirmed, with costs.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Judgment affirmed, with costs.

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THE CHEVRA BNEI ISRAEL AUSHE YANOVA UND MOTAL, Appellant, *v.* THE CHEVRA BIKUR CHOLIM AUSHE RODOF SHOLEM, Respondent.

(Supreme Court, Appellate Term, April, 1898.)

Appeals — Exceptions cannot be considered where the record is defective.

The Appellate Term cannot consider exceptions, filed to findings of fact which are alleged to have been made by a justice of the Municipal Court of the city of New York, where the record does not contain his findings or decision; nor can the question of the loss of jurisdiction, through alleged illegal adjournments, be considered, where the record does not state the dates of the several adjournments nor at whose instance they were granted.

EXCEPTIONS to certain findings of fact, in returns.

Abraham B. Schleimer, for appellant.

Abraham H. Sarasohn, for respondent.

Per Curiam. Exceptions were filed in each case to certain findings of fact stated to have been made by the justice on the 17th day of January, 1898. Neither of the returns contains such findings or decision. If made, they should be annexed to the return, and if not made, then the record should be amended by inserting a statement to that effect.

The appellant claims that the justice adjourned the trial of these causes from the 13th to the 15th day of October, 1897, without good cause shown, at the request of the defendant, and against plaintiff's objection, and that in consequence thereof the justice's jurisdiction over it was lost. The return in Action No. 1 shows that issue therein was joined on the 2d day of July, 1897, and that the cause "was thereupon adjourned until the 30th day of July, 1897, at 9 o'clock in the forenoon, and from time to time again until the 14th day of January, 1898," when the action was tried. The return in Action No. 2 shows that issue therein was joined on the 9th day of July, 1897, and that the cause "was thereupon adjourned until 15th day of October, 1897, at 9 o'clock in the forenoon, and from time to time again until the 14th day of January, 1898," when the case was tried.

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It will be observed that the returns fail to specify the date of the adjournments and at whose instance they were had. Therefore such returns should be amended by having inserted therein the specific adjournments, and, if opposed, by whom. If any papers were filed on applications for postponement, the justice should annex the same, or copies thereof, to the return.

For these reasons a reargument must be ordered, the return to be amended meanwhile.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Reargument ordered; return to be amended.

LILLIAN TRAVER CARR, Plaintiff, *v.* THE NATIONAL BANK & LOAN CO. OF WATERTOWN, Defendant.

(Supreme Court, Jefferson Special Term, April, 1898.)

1. **Fraudulent representations — A bank president selling its own worthless securities to a woman who confided in him as her friend and agent — Liability of the bank — Concealment of its ownership.**

Proof that the president and manager of and a large owner in a banking corporation, who had purchased certain securities at a discount and for the purposes of speculation, tendered his services as a friend and gratuitous agent to a woman, unacquainted with business, in finding her first-class investments, that she, solely upon his advice, purchased the securities held by the bank upon his representations that they were first-class in every respect and as good as gold, that he concealed the fact of the bank's ownership and exacted from her the highest price possible, entitles her, upon further proof that the securities were of little value, that some were second mortgage bonds and that default was subsequently made in the payment of nearly all, to rescind, and upon offering to restore, to recover her moneys of the bank, as it must be deemed to be bound by the acts of its chief executive officer.

2. **Agency — The agent cannot sell his own property to the principal.**

Where a person assumes to act as an agent in the purchase of property, he cannot lawfully sell his own property to his principal, except with her knowledge and consent.

THIS action is brought to recover the sum of $12,000, with interest thereon, alleged to have been paid by the plaintiff to the

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defendant for the purpose of having the same invested in securities to be purchased by the president of the defendant for her, upon the ground that said money was obtained from the plaintiff and permitted by her to be used in the purchase of said securities, by reason of the false and fraudulent statements and representations of the defendant's agent and because certain material facts relating to the interest of the defendant in said securities were concealed by it from the plaintiff.

Elon R. Brown, for plaintiff.

Purcell & Carlyle (John Lansing, of counsel), for defendant.

McLennan, J. At the times mentioned in the complaint the defendant was a banking corporation, organized under the laws of the United States, and having its principal place of business in the city of Watertown, N. Y. Defendant's president and manager was George H. Sherman, who was also a large owner of its capital stock. In the latter part of the year 1892, the plaintiff deposited in the defendant's bank about $13,000, for the purpose of having the same invested by Mr. Sherman for her. At that time and for many years prior thereto, Mr. Sherman was regarded by the plaintiff as a true and disinterested friend of herself and of her husband, then lately deceased, and sustained to them close and confidential relations. By reason of such supposed friendship and confidential relations he was given full power and authority to invest the money deposited by her, to sign her name to checks, to draw the same from the bank and to deal with the money in such manner as he might see fit for the purpose of investing the same. The plaintiff was not acquainted with business methods, had had no experience in the transaction of business, knew nothing about securities or investments, and so informed Mr. Sherman, and told him that she would, and, as matter of fact, did rely entirely upon Mr. Sherman in securing investments for her. She was led to believe by him that his only interest in the transaction in question was to promote and look after her interest.

He first represented to her that he could find good, first-class securities for her, and tendered his services to her solely as a matter of friendship. Later he represented that he had found such securities, and at the time of the transfer of the securities in question he represented that they were first-class securities in every respect;

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that they were as good as gold, and led her to believe that he had procured them expressly for her, and that he had no personal interest in the transaction.

As matter of fact the securities transferred to the plaintiff, amounting to $12,000 par value, were, at the time of the transfer to her, the property of the defendant, and had been for some time prior thereto. This fact was concealed from the plaintiff by defendant's president. The defendant had purchased the securities for speculative purposes, for at least 5 per cent. less than their face value, and transferred them, through its president, to the plaintiff at their par value. The expense of the investigation which led the defendant to purchase the securities in question was paid to it by customers or creditors of the defendant, who were interested in disposing of the same. The securities transferred to the plaintiff were not first-class securities; were not as good as gold, and some of them were not as represented by defendant's president in other respects. The plaintiff made no inquiry or investigation in regard to their value, did not even examine them as to their form or character, but purchased them relying solely upon the advice, statements and representations of defendant's president.

Before the commencement of this action, default was made in the payment of interest upon all or substantially all of the securities purchased by the plaintiff. She then, through her counsel, made investigation and discovered that the securities were not as represented by defendant's president; and that they were not purchased for her, but were securities which, at the time of the transfer to her and for some time previous thereto, were the property of the defendant. It was also discovered that said securities were then of little value. Thereupon, and before the commencement of this action, the plaintiff tendered to the defendant the securities which she had purchased of it and demanded the money from the defendant which she had paid. This was refused and action was commenced.

Considering the relations which existed between the plaintiff and defendant's president at the time the sale of the securities in question was made, it must be held that the representations made by Mr. Sherman as to the value and character of the securities were material; that they were relied upon by the plaintiff and induced her to make the purchases in question.

It is further held that the representations so made were not true, and that the plaintiff sustained damage by reason thereof,

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Mr. Sherman stated to the plaintiff that the securities transferred to her were first-class securities; were as good as gold. Both statements were untrue.

The case of Rothschild v. Mack, 115 N. Y. 1, was an action brought to recover the amount of a note which the plaintiffs indorsed and procured to be discounted, upon the representation made at the time that it (the note) was as good as the Bank of England and that the plaintiffs would run no risk in indorsing the same. At page 7 the court, by Peckham, J., says: "If he (the party making the representations) did not know its condition (the condition of the makers of the note), he yet assumed to have actual knowledge of the truth of his statement that the note was as good as the Bank of England. * * * He certainly meant to convey the impression of actual knowledge of the truth of the representations he made as to the value of the note, and he either knew such representations were false or else he was conscious that he had no actual knowledge while assuming to have it and intending to convey such impression. If damage ensue, this makes an actual fraudulent representation."

As to some of the securities, Mr. Sherman represented to the plaintiff that they were first-mortgage bonds. As matter of fact they were second-mortgage bonds, and so appeared upon their face. The plaintiff did not examine them; they were retained by Mr. Sherman in the defendant's bank, and she relied implicitly upon the statements of Mr. Sherman. It is held that such a representation was sufficient ground for rescinding the sale as to those securities. In the transactions in question, Mr. Sherman represented the defendant, and it was bound by his acts in the sale of the securities, owned by it, to the plaintiff.

In the case of Fairchild v. McMahon, 139 N. Y. 290, the headnote is as follows: "All persons who act for or in the name of the owner in bringing about the transaction must be deemed his agents where he accepts the fruits of their efforts, and all the methods employed by them are imputable to him; he may not, even though innocent, receive and recover upon a security given on the sale, and at the same time disclaim responsibility for the fraud by means of which the purchaser was induced to deliver it."

In this case the money of the plaintiff was permitted by her to be paid over to the defendant by reason of the false statements of Mr. Sherman, its president and manager. It has retained such moneys, and its obligations to the plaintiff are precisely the same

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as Mr. Sherman's would have been had he been the owner of the securities.

It is further held that the plaintiff is entitled to rescind the contract for the sale of the securities in question, for the reason that Mr. Sherman, while assuming to act as the plaintiff's agent to buy securities for her, procured the securities in question of the defendant, of which he was president and manager and owner of a large amount of its capital stock. His obligation, at the time, to the plaintiff was to purchase securities for her as cheaply as possible. It was for his interest to sell the securities, which he did, at the highest possible price. It was his duty, as president of and as representing the defendant, to do the same.

In the case of Conkey v. Bond, 36 N. Y. 427, the head-note is as follows: "An agent under a general authority to purchase, cannot buy from himself without the knowledge or assent of his principal. Such a transaction is a breach of duty, and the contract is subject to rescission, irrespective of any question of intentional fraud or actual injury."

And, at page 429, the court say, Porter, J.: "There is no view of the facts in which the transaction can be upheld. He (the defendant) stood in a relation to his principal which disabled him from concluding a contract with himself, without the knowledge or assent of the party he assumed to represent. He undertook to act at once as seller and as purchaser. He bought as agent, and sold as owner. The *ex parte* bargain, thus concluded, proved advantageous to him and very unfortunate for his principal. It was the right of the latter to rescind it, on discovery of the breach of confidence. It is not material to inquire whether the defendant had any actual fraudulent purpose. The making of a purchase from himself, without authority from the plaintiff, was a constructive fraud, in view of the fiduciary relation which existed between the parties."

The case of Mayo v. Knowlton, 134 N. Y. 250, was a case in which the defendant agreed to purchase for the plaintiff 4,000 shares of the stock of the Silver King Mining Company. In pursuance of that agreement the defendant transferred to the plaintiff the stock of the company belonging to himself, and received and retained to his own use the money paid therefor. It was held that, upon the discovery of such fact, the plaintiff had a right to rescind the contract and recover back the purchase price paid.

A large number of other cases might be cited holding expressly that where a person assumes to act as agent for another in the pur-

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chase of property, he cannot sell to his principal his own property without the knowledge and consent of his principal, and that, if he does so, upon the discovery of the fact, irrespective of any other circumstance or consideration, the purchaser is entitled to rescind the contract. In the case at bar, as before said, Mr. Sherman was employed by the plaintiff to purchase securities for her. Thereupon he became charged with the duty of procuring them upon the best terms possible. She had a right to assume that he had no interest antagonistic to hers that, by any possibility, could influence him in the discharge of his duty to her. At the same time he was representing the defendant as its chief executive officer, and was charged with the duty of selling its securities at the highest price possible. His personal interest was also to obtain for the securities of the defendant the best price he could. Without disclosing such interest of the defendant or that of himself, he sold the defendant's securities to the plaintiff. The defendant received and has retained the proceeds of such sale. As before said, it is held that, upon the discovery of such facts, the plaintiff was entitled to rescind the contract, and recover from the defendant the moneys which she had paid in pursuance thereof.

It follows that the plaintiff is entitled to judgment against the defendant for the relief demanded in the complaint, with costs.

Ordered accordingly.

HUGH V. RODDY, Jr., Plaintiff, *v.* THE BROOKLYN HEIGHTS RAILROAD CO. et al., Defendants.

VALENTINE SCHMIDT, Plaintiff, *v.* THE BROOKLYN CITY & NEWTOWN RAILROAD CO. et al., Defendants.

(Supreme Court, Kings Special Term, April, 1898.)

Street surface railroads — When organized before 1874 they may contract for mutual use of their tracks without obtaining the consents required, since 1874 by the Constitution — Effect of Laws of 1839, chap. 218.

Street surface railroad corporations, incorporated before 1874 and since operated by themselves or lessees, have a right, under section 78 of the Railroad Law of 1890 as amended (the same constituting a substantial re-enactment of chapter 218 of the Laws of 1839, not affected by the repeal of the act of 1839 itself) to contract with

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another street railroad corporation "for the use of their respective roads and routes or any part thereof" without first obtaining the consents required by the Constitutional Amendment of 1874 and by the Constitution of 1894, as those provisions were designed to act prospectively only and cannot divest a right which had already vested under the act of 1839, as re-enacted in the Railroad Law.

MOTION in each action for an injunction *pendente lite.* Facts appear in opinion.

Morris & Whitehouse, for plaintiffs.

Chas. A. Collin, William C. Trull and Wm. N. Dykman, for defendants.

MADDOX, J. A motion is made by the plaintiff in each action for an injunction *pendente lite, i. e.*, in the Roddy case to enjoin the operation by the Heights company of its cars, upon the tracks of the Newtown company on Washington street in front of the abutting premises of that plaintiff, and in the Schmidt case to restrain the operation by the Newtown company and by the Coney Island company of their cars upon the tracks of the Heights company, on Fulton street in front of the abutting property of Schmidt, upon the ground that the constitutional and statutory conditions, now in force, not having been complied with, such operation is unlawful and an invasion of plaintiffs' rights.

The defendants are domestic street surface railroad corporations operating their cars by the overhead trolley system.

The Newtown company and the Coney Island company were organized, respectively, in May and December, 1860, under the General Railroad Law of 1850 (chap. 140), and the Heights company was incorporated in 1887, under the General Railroad Law of 1884 (chap. 252).

The Heights company acquired, as lessee, under a lease made in 1893, the railroads, franchises, property and rights of the Brooklyn City Railroad Company, a domestic street surface railroad corporation organized, in December, 1853, under the General Railroad Law of 1850 (chap. 140), and has since June, 1893, maintained and operated such roads, including the double-track road on Fulton street, in front of Schmidt's property, and also that on Sands street in front of the Brooklyn Bridge entrance.

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Said roads on Fulton and Sands streets, joining at the junction of those streets, had been previously constructed and operated by the said Brooklyn City Railroad Company, pursuant to chapter 77 of the Laws of 1854, from about 1854 until the lease thereof to the Heights company in 1893.

The Newtown company constructed its Washington street route about 1872, pursuant to chapter 165 of the Laws of 1872, and maintained and operated the same until 1897, when it leased its railroads, franchises, property and rights to the Coney Island company, which latter company has since operated the same, including the double-track road on Washington street, in front of Roddy's property, to and crossing Sands street at the Bridge entrance.

In 1897, these defendants and the Nassau Railroad Company, also a domestic street surface railroad corporation, by contracts with the bridge trustees, acquired the right to run and operate some of their cars, for the transportation of passengers between the boroughs of Manhattan and Brooklyn, upon and over the roadways of the bridge, using the northerly roadway in going to the borough of Manhattan and the southerly roadway in returning to Brooklyn, such cars entering and leaving the respective roadways at their intersection with Sands street, and the only tracks connecting with such roadways are the Sands street tracks of the Heights company, which connect with both, and the Newtown company's tracks on Washington street, connecting by a switch or siding with the northerly roadway only.

The defendants, prior to the commencement of these actions and before the Newtown company's lease to the Coney Island company, by contract agreed upon a plan for the operation of their cars in crossing the bridge and, among other things, that the Heights company shall have the use of the Washington street tracks of the Newtown company, in front of Roddy's property, and the right to operate thereon its bridge-crossing cars bound for the borough of Manhattan, thereby connecting with the northerly roadway of the bridge, and the Newtown and the Coney Island companies to have the use of the Fulton street tracks of the Heights company, in front of Schmidt's premises, and the right to operate thereon their bridge-crossing cars returning from the borough of Manhattan.

It is that right to use the tracks of another company and to operate cars thereon, without first obtaining the consents of the municipal authorities and of the abutting property owners, or in lieu of the property owners' consents the approval of the Supreme

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Court, that the plaintiffs challenge and the same questions are presented on both motions.

Chapter 140 of the Laws of 1850 required the consents of a majority of the abutting property owners to the construction of a railroad in cities, but no question has been raised here as to the right of the defendants to operate their cars on their respective roads.

The tracks are on those streets, and we must assume, in view of the length of time the respective roads have been so operated and the fact that the construction thereof was prior to the constitutional amendment of 1874, in the absence of some proof to the contrary, that the statutory requirements operative at the time of such construction have been complied with.

By chapter 218 of the Laws of 1839 it was enacted that "It shall be lawful for any railroad corporation to contract with any other railroad corporation for the use of their respective roads and thereafter to use the same in such manner as may be prescribed in such contract," and that act was not amended and remained unrepealed until 1890 (chap. 565, § 180), when its provisions were re-enacted in section 78 of the Railroad Law (chap. 565), which as since amended (chap. 676, Laws 1892; chap. 433, Laws 1893), now provides that "any railroad corporation or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract," the words *or any part thereof* having been added by the amendment of 1892.

The language *any railroad corporation* comprehends all, and hence the act of 1839 applied, and section 78 of the Railroad Law of 1890, as amended, applies, to street surface railroad companies. People v. O'Brien, 111 N. Y. 64.

Railroad corporations have only such powers as are expressly or impliedly given by law, and the act of 1839 conferred the right to exercise an additional power, one not theretofore possessed, since it gave capacity to contract for the use of the road, and hence the right to enter into a lease or a traffic agreement involving such use.

Chapter 252 of the Laws of 1884, section 15, authorized any street surface railroad corporation to lease or transfer, to any other such company, the right to run upon or use any portion of its tracks, prohibiting, however, any such lease by one company to another owning or operating a parallel road thereto, in cities of

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over 300,000 population, and the act of 1884 did not repeal chapter 218 of the Laws of 1839. People v. O'Brien, 111 N. Y. 65.

The power so to contract under the act of 1839 pertained to the franchise, since it related to the use of the road, the tracks, and it bears, indeed, as close relation to the franchise as the right to sell, to mortgage or to lease, all of which are elements of property.

The re-enactment of the provisions of the act of 1839 in section 78 of the Railroad Law of 1890, "the provisions * * * being substantially the same," must "be construed as a continuation of such law, and not as a new enactment," notwithstanding the repeal thereof by section 180 of the Railroad Law of 1890, for such is the legislative declaration. Railroad Law, chap. 565; Laws 1890, § 182; General Corporation Law, chap. 687; Laws 1892, § 36; Statutory Construction Law, chap. 677, Laws 1892, § 32, as amended by chap. 448, Laws 1894.

But the repeal thereof, even if such re-enactment in section 78 did not operate as a continuation of the prior statute, cannot avail the plaintiffs, since the right to so contract, conferred by the act of 1839, was an accrued and an acquired right of the defendants, and it has been expressly enacted that such repeal "shall not affect or impair * * * any * * * right * * * accrued or acquired, * * * but the same may be asserted, enforced * * * as fully and to the same extent as if such law had not been repealed." Railroad Law, chap. 565, Laws of 1890, § 181; General Corporation Law, chap. 687, Laws 1892, § 31; Statutory Construction Law, chap. 677, Laws 1892, § 31.

Such right to contract for the use of their respective roads was, therefore, preserved in these defendants. People ex rel. Standard G. L. Co. v. Gilroy, 67 Hun, 323.

The contention of plaintiffs' counsel, that section 78 of the Railroad Law applied to railroad corporations other than street surface companies, is, I think, without force. That section is a part of article III, which relates to the "consolidation, lease, sale and reorganization" of railroad corporations and, after a careful reading of all sections embraced in that article, I have been unable to find any language indicative of an intention that the provisions thereof were not to apply to and govern all, including street surface companies.

Concededly, then, the right, the power and the authority of the defendants to contract for the use of their respective roads, or of any part thereof, still exists, unless such right, power and authority

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have been destroyed or diminished by the constitutional amendment of 1874, or by the Constitution of 1894.

The amendment of 1874 provided that "no law shall authorize the construction or operation of a street railroad, except upon the condition" that the required consents be first obtained, and that provision was incorporated in the Constitution of 1894 (art. III, § 18) in the same language.

The constitutional and statutory conditions, in force since January 1, 1875, undoubtedly apply to the operation, as well as to the construction of a street railroad, for the language is disjunctive, but no property rights were disturbed or impaired by that amendment of 1874, nor by the Constitution of 1894.

The law (chapter 218, Laws of 1839) had, however, previously, authorized contracts by railroad corporations for the use of their respective roads, which of necessity carried with it the right to operate cars over a road then in operation, and there is no constitutional or statutory inhibition against such use as is contemplated by the act of 1839, and section 78 of the Railroad Law.

The constitutional amendment of 1874 and the Constitution of 1894 were future limitations upon the legislative power; they operated prospectively and were not retroactive in effect. Matter of Gilbert E. R. Co., 70 N. Y. 361; People v. Brooklyn, F. & C. I. R. R. Co., 89 id. 85; Am. & Eng. Ency. of Law (2d ed.), vol. 6, p. 917.

They destroyed no then existing right of these defendants nor did they diminish the power conferred by the act of 1839, to contract for the use of their respective roads, for, as was held in People v. Brooklyn, F. & C. I. R. R. Co., *supra*, "the prohibition invoked is one against future legislation, and has no reference to previously existing laws."

The decision in the Colonial C. T. Co. v. Kingston R. R. Co., 153 N. Y. 540, is not, in my opinion, decisive of these motions. The main question presented here, the right of railroad corporations to contract for the use of their respective roads or of some part thereof, and thereafter to use the same, to operate cars thereon, was not before the court in that case.

There plaintiff sought to acquire, *in invitum*, by condemnation proceedings, the right to use a portion of the defendants' road and thereby connect the two sections of its road. The plaintiff had not obtained the consents of the local authorities and of the abutting property owners to the operation of its road on that portion of the

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street on which was the road it sought to acquire the use of, and hence did not have "sufficient vitality and strength to go on with and to construct a railroad." * * * Matter of Rochester E. R. Co., 123 N. Y. 358.

It is now well settled, that in condemnation proceedings the plaintiff must, as a condition precedent, establish a clear legal right to exercise the rights, powers or privileges sought to be acquired thereby, and the learned judge, writing the opinion in the Kingston case, on the motion for a reargument (154 N. Y. 495), said: "The prohibition of the Railroad Law is absolute so far as the plaintiff, proceeding *in invitum*, is concerned, and does not depend upon what the defendant might have the power to voluntarily agree to."

And it was also said, in that case (page 495): "It was not our intention to decide any case but the one before us, which simply involved the standing of the plaintiff to make the application in question, and our opinion should be read in the light of that purpose. * * * A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance."

Consequently the main question here was not passed upon in that case, nor was section 78 of the Railroad Law (Laws 1890, chap. 565) considered.

For the reasons above stated, my conclusion is, the right of the defendants so to contract for the use of their respective roads and to operate cars thereon was a vested right, not dependent for vitality or authority upon any law enacted since the constitutional amendment of 1874 and the exercise of that right is not violative of any constitutional provision. People v. Brooklyn, F. & C. I. R. R. Co., *supra;* Ingersoll v. Nassau E. R. R. Co., 89 Hun, 213; Kunz v. Brooklyn Heights R. R. Co., MSS. opinion of Mr. Justice W. M. Smith.

The motions are, therefore, denied.

Motions denied.

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FERDINAND KURZMAN et al., Plaintiffs, *v.* AURELIA LOWY et al., Defendants.

(Supreme Court, New York Special Term, April, 1898.)

Trusts — A stipendium established in Germany — Bequest to the chief magistrate of Berlin, as patron of a Latin school — Indefiniteness of beneficiaries — A trust shall not fail for want of a trustee.

A bequest to the chief magistrate of the city of Berlin, Germany, to establish, in a designated Latin school of which he is the patron, the Bonnell-Gutmann Stipendium, with directions that, after their separate amounts have been fixed, the stipendium shall be granted to graduates, among other things, "according to the free judgment * * * of the director or College of Professors of the said Latin school and according to the need of the applicants" is a valid disposition.

The designation of the trustee, as chief magistrate, is sufficient and he may be regarded as a *locum tenens*.

The trust is not void for indefiniteness as to the beneficiaries, as, in the event that the director and the college professors should differ in the matter of their selection, the chief magistrate would be justified in accepting the choice of the director or that of the professors.

The refusal of a trustee to act is not material nor is it to be presumed; and the court will not assume that, should it occur, a foreign court would permit the trust to fail, but will asume that it would appoint a trustee.

ACTION for the construction of a will.

Otto Horwitz, for plaintiffs.

Richard M. Bruno, for defendant Zelle.

RUSSELL, J. The plaintiffs seek a construction of the will of Dr. Edward Gutmann, late of the city of New York, who in early life was a native of Germany. The defendant Zelle is the chief magistrate, mayor or burgomaster of the city of Berlin, Germany, and the questions arising on this investigation are narrowed down to that of the lawfulness of the bequest to the defendant Zelle, or to him as chief magistrate of Berlin.

The provision in the original will is as follows:

"Second: I give and bequeath the sum of five thousand dollars to the Chief Magistrate of the City of Berlin, Prussia, IN TRUST,

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to be by him and his successors there safely invested, and the income used and applied to the purpose of the Bonnell-Gutmann Stipendium, as stated in the instrument in the German language by me written and hereto annexed, which I hereby make part of this will. In case this legacy should at any time be called in question, or be declared invalid, then I give and bequeath the sum of five thousand dollars herein mentioned to my said wife absolutely, with the hope that she will apply the same as in this clause of my will directed, but I expressly declare that the expression of this hope shall not be construed so as to impose any legal obligation on her to do so, or so as to create any trust of whatsoever kind, for the purpose hereinbefore mentioned. I expressly declare that the legacy herein mentioned is not to be deemed a charge on my real estate."

The provision annexed to the will is as follows:

"Testamentary provision in regard to the creation of a Stipendium for the graduates of the Friederich-Werder Latin School at Berlin.

"1st: As soon as possible after my demise, I desire that $5000 be paid to the Chief Magistrate of the City of Berlin, as the patron of the above mentioned Latin School, provided that no legal obstacles retard the execution of the subsequent provisions for the creation of a stipendium for graduates of the Friederich-Werder Latin School, said stipendium to be granted to graduates who desire to follow their studies at the Berlin University and who are worthy of such assistance.

"2: The bequest is to be known as the BONNELL-GUTMANN bequest.

"3: From the interest of the capital hereby bequeathed, one or more stipendia should be granted none for a longer period than four years, according to the free judgment of the authorities in charge respectively of the director or College of Professors of the said Latin School and according to the need of the applicants.

"4: No stipendium should be less than three hundred marks or more than four hundred and fifty marks per annum.

"5: In awarding said stipendia the religious belief of the applicant should under no circumstances be considered either in granting or refuting said stipendia. Gentiles as well as Hebrews should be equally eligible. The latter, however, should be primarily considered for the reason that the Friederich-Werder Latin School has only very few stipendia in which students of the Jewish

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faith are entitled to participate. But this consideration should not be carried so far that thereby worthy Christian applicants should be overlooked. The testator, who himself has been brought up in the Mosaic belief, desires by the foregoing provision only an impartial distribution in compliance with the tolerant spirit of the times.

"6: Only such students who enter the physiological, medical, or law faculty of the University of Berlin shall be entitled to make application for stipendia. Positively excluded should be students of Christian or Hebrew Theology.

"7: As it is the special desire of the testator to promote the ideal, that is to say the humanistic studies, such applicants should be specially considered who desire to devote themselves to the study of antiquity, be it classical philology, or history, special knowledge of antiquity or art history of Greece and Rome.

"8: Pupils of the uppermost class or of the said Latin School should be informed in the proper manner of the existence and condition of this bequest so that applicants can file their written application for it in due time. When the prerequisites of capacity and need of circumstances equal, then the granting of the stipendia should be governed by the time of leaving said Latin School. Only in urgent cases of special need and profound capacity, should later applicants be preferred to those already placed on the eligible list.

NEW YORK, *June* 19, 1883.

Signed DR. EDWARD GUTMANN."

By the latest codicil the testator increased the bequest by a provision in these words:

"CODICIL.

"For the proper execution of my last Will and Testament made and signed by me on the 27th day of February, 1891, I hereby give the following directions:

"By this above-named document I have ordered that $5000 shall be sent to the Magistrate of the City of Berlin, Prussia, for the purpose of establishing the Bonnell-Gutmann Stipendium. I hereby order that instead of $5,000, the sum of thirty thousand (30,000) marks Germany money, in full, shall be transmitted to said Magistrate to establish this stipendium.

"NEW YORK, *April* 9, 1895.

"DR. EDWARD GUTMANN [L. S.]"

It is the policy of the law of this state to allow testators free power to provide for the disposition of personalty, which is to be

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taken to a foreign country, in accordance with the laws of that country. Such property as shall remain within the state of New York must be subject to the laws against perpetuities and forbidden trusts, for the laws of this state in that respect are designed to operate upon all the property within its limits. They are founded upon public policy which provides for proper power of disposition of property from person to person, without undue curtailment of the right in some one, within reasonable periods, to pass the title.

But the object of the law is satisfied if the property is to be removed from the jurisdiction of the state. It leaves the courts of that other state the power to guide and control the execution of the trusts and the fulfillment of the issues of the testator. Hope v. Brewer, 136 N. Y. 126; Chamberlain v. Chamberlain, 43 id. 424; Matter of Huss, 126 id. 537.

The courts of this state retain jurisdiction over the executors under a will probated here to adjudicate whether they have lawfully passed to properly designated legatees that portion of the property which the testator attempts to bequeath. For that purpose the courts here may inquire as to whether executors can pay over to legatees and whether a sufficiently specific designation has been made to justify payment.

It is not strenuously contended that the designation of the chief magistrate of the city of Berlin is insufficient. Though named officially he may receive, if not as an official, yet as an individual *locum tenens*. Inglis v. Trustees Sailors' Snug Harbor, 3 Peters, 99.

But it is strongly urged that the purpose of the trust is too indefinite. If so, it may be that a mere naked holding for an indefinite purpose would not justify the executors in passing over the amount of the legacy.

The general object of awarding the stipendia is sufficiently indicated if the way or course of the transmission of the benefits be sufficiently certain. It is proper to confer upon the individual making the award a reasonable discretion of selection; and the testator has thoughtfully indicated the general class of the proposed recipients of his bounty. Assuming the selection is to be made by the director or college professors of the Latin School in Berlin, I see no difficulty in the acceptance by the mayor of Berlin of a designation by either; and, if not by the construction of the courts of the kingdom of Prussia upon the subject-matter involved, in case there is no union of designation in the execution of the trust, I cannot pronounce this bequest void for uncertainty because

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of a possible disagreement between the director and the college of professors, even if the ordinary construction of the will suspends the payment of the stipendia until such agreement be made.

We have the benefit, in this case, of the evidence of applicable statutes of the kingdom of Prussia. By the evidence of the Prussian advocate and the commentary of the laws of Prussia used by the courts there, it appears that much of the law applicable to the construction of wills and their execution is the same in that kingdom as in this state. By section 139 it is declared that "he who has been charged with the fulfillment of one of several conditions may choose the one he is willing to fulfill."

"Defective denominations or designations do not invalidate the disposition of the testator when his true intention is clear." § 490. "Whenever testamentary dispositions are of doubtful meaning they must be interpreted so that they can best be upheld in accordance with the law. The rules for the interpretation of declaratory acts must be applied also to the interpretation of testamentary dispositions." Title 4, § 65.

"If, in a declaratory act, the intention is clearly shown, then all doubtful points must be interpreted conformably with that intention." § 70.

"All declaratory acts which are of doubtful meaning must be interpreted so that they will not be left altogether ineffective." § 74.

It is the general rule that the law will not permit the object of the testator to be defeated or a trust to be unexecuted on account of the refusal of a trustee to act. In case the mayor of Berlin shall call upon the director and the college of professors to select beneficiaries, and either one should refuse to act, there is no valid objection to his acceptance of selection by the other. It is plain that, if only one had been spoken of in the will, the refusal of that one to select would be no bar to the awarding of benefits by some one who might be designated by the court (in case the chief magistrate would not, in that case, have power of selection) in a proceeding before the courts of Prussia at some future time, based upon the simple obstacle of a refusal to act by the person designated. And it is more than probable that compulsory action, operating upon the designators selected, might be directed by the courts of Prussia.

I am of the opinion that the provisions under consideration are valid and judgment should be so directed.

Ordered accordingly.

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JAMES R. WHYTE et al., Plaintiffs, *v.* THE BUILDERS' LEAGUE OF NEW YORK, Defendant.

(Supreme Court, New York Special Term, April, 1898.)

Easements, servient to a rear house, built in part on two lots, determined by a partition of the lots among the heirs of their common owner — Right of user as an "appurtenance" — Recitals indicating a complete separation of the estate.

The owner of two lots on a city street erected thereon two buildings abutting upon the street, and in the rear thereof three buildings. The division line between the two lots passed through the middle of the center one of the three rear buildings, the water supply for which came from the street pipe through the most easterly of the two lots, its chimney being built substantially on the line between the two lots, along which line there was also built a common sewer. By conveyances executed between the heirs of this original owner, the two lots were conveyed to different parties and a subsequent purchaser of the easterly lot sawed the middle rear house through its centre line, removed the half part situate on his lot and erected in its place another structure, thus destroying the sewer connection of and the water supply to the west half of the middle house. In an action brought by the purchaser of the westerly lot to compel the restoration of the easterly half of the building, which had been destroyed, and for the recovery of damages occasioned by its removal, it was Held, that the owner of the easterly lot had a right to remove the portion of the building which stood thereon and to utilize it for his own purposes; that the chimney, sewer and water pipe were servient to the middle house and incidental to its use, and that the right to their user fell with the separation of the estate in the middle house.

That such right of user did not constitute "an appurtenance" to the lots conveyed so as to be a common servitude for both.

That this construction was supported by the fact that the conveyances were expressly made subject to the agreement of any tenant or tenants then occupying the premises, or any part thereof, indicating that the parties understood the separation of the title to each lot to be complete, as no such reservation was necessary if each half of the middle house was appurtenant to the lot on which the other half rested.

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ACTION to compel the restoration of the easterly half of a building, and for damages occasioned by its removal.

Charles D. Ridgway, for plaintiffs.

Dulon & Roe, for defendant.

RUSSELL, J. The plaintiffs seek to compel the restoration of the easterly half of a building formerly standing on two lots on the south side of One Hundred and Twenty-sixth street, in the city of New York, and damages occasioned by the removal of this easterly half. The common source of title of the parties was Andrew Crawford, who died in the year 1872. Prior to his death, and while he was the owner of the two lots, with two others on the north side of One Hundred and Twenty-fifth street, he erected five three-story frame buildings, two fronting on One Hundred and Twenty-sixth street, one of them on the lot, a life estate in which is now owned by the plaintiffs, the other on the lot which is now owned by the defendant in fee; and the other three buildings in the rear of the two lots, the middle building covering about eight feet of the plaintiffs' lot, and eight feet of the defendant's lot, all three being covered by the same roof, with studding partitions separating the middle building from the two others. A common sewer ran along the dividing line of the two lots. This middle building is the one in controversy.

In 1880, by conveyances between the heirs, the westerly lot was deeded to Jessie Whyte, the mother of the plaintiffs, upon whose death, in 1893, the plaintiffs received their title; and the easterly lot was conveyed to Barbara Ewan, from whom the defendant received its title.

Up to a short time prior to the deed to the defendant of the easterly lot, which was July 7, 1897, the owners of the two lots by common consent rented the middle house, covering parts of the two lots to tenants, and divided by amicable arrangement the rentals received. The entrance to the middle house was east of the dividing line between the two lots, and the water supply for the middle house came through the street-pipe, passing through the easterly lot. The chimney for the middle house was built substantially on the line between the two lots.

Prior to the receipt of the defendant's deed it had notice that the plaintiffs claimed rights in the easterly half of the middle house, and a right of access over the defendant's lot thereto. On the day that the defendant received its deed this middle house had been sawn through on the line between the two lots, and, thereafter, it

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removed such separated half, and proceeded to erect a structure of more enduring character, destroying the sewer connection and the water supply to the west half of the middle house, but leaving sufficient room to enable the plaintiffs to close the opening left by such severance in the house; and thereafter the plaintiffs arranged their half of the house so that it could be used with the westerly house standing on their lot.

The question now arises whether the defendant had a right to remove all obstructions upon its own lot and utilize it for its own purposes, or whether the free title apparently conveyed to them was really incumbered by operation of law so that the defendant was obliged to permit the frame building to stand until it crumbled down or was destroyed by the elements, thus impairing the available use of its own property in a section of the city, the lots in which were rapidly increasing in value.

The chimney, sewer and water pipe were servient to the middle house, and incidental to its use, and their user fell with the separation of the estate in the middle house. They were not essential to the westerly house, and, therefore, were mere incidents to the use of the middle house, so long as the right of user of that middle house existed in common to both parties. The plaintiffs claim that the deed to their mother, given at the same time as the deed to the defendant's grantor, conveyed all of the appurtenances to the lot, each of these conveyances describing the lands conveyed, and separating them by the division line between the two lots. The defendant claims that each of the grantees in the partition deeds obtained a free and untrammeled title to the lands described, and all of the structures erected thereon.

It is a well-known rule that where the owner conveys part of lands owned by him he impliedly grants all apparent easements used by the owner for the benefit of the part granted, and necessary to its reasonable use, such as water supply from a spring (Paine v. Chandler, 134 N. Y. 385); a beam right in a party wall (Rogers v. Sinsheimer, 50 N. Y. 646); the right to use the water of a reservoir for the benefit of a mill (Simmons v. Cloonan, 81 N. Y. 557); a drain which has become a permanent channel and in which flows a continuous stream. Curtiss v. Ayrault, 47 N. Y. 73. But the servitude must be apparent. Butterworth v. Crawford, 46 N. Y. 349.

No case has been found which declares the use of a building erected on two adjoining lots to be a common servitude for both. The division of the title in this case separated the interest which

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was theretofore common to the owners, by their own act, into a single interest as to each half, to be disposed of at pleasure. Had the defendant's grantor proceeded to remove her part of the frame building at once she might have done so. She was not obliged to retain an eight-foot structure upon her lot to serve simply as a weather protection for the other half of a frame structure. A contrary rule would largely destroy the value of the property received by an incubus which had never been imposed upon it by any agreement. The term "appurtenances" conveys only incorporeal easements, or rights or privileges which are necessary to the proper enjoyment of the estate granted. Griffiths v. Morrison, 106 N. Y. 165.

This view is fortified by the terms of the partition deeds. The conveyances were expressly made subject to the agreement of any tenant or tenants then occupying the premises or any part thereof. The intelligent mention of this reservation shows that the parties understood the separation of the title to each lot to be complete, and guarded against the disturbance of possession for any tenant until his tenancy had terminated. No such reservation was essential if each half of the middle house was appurtenant to the lot on which the other half rested.

The use, for rental purposes, of the middle house by the owners in common up to near the time the defendant received its deed was for convenience and facility of renting. Such an arrangement could be terminated at will, subject to the contracts made with third parties. No servitude was thus imposed upon the title to the premises.

Judgment is directed dismissing the complaint, with costs.

Complaint dismissed, with costs.

Matter of the Judicial Settlement of the Accounts of MARCUS D. BOTSFORD and JOSHUA PRATT, as Surviving Executors of the Will of DEVILLO WHITE, Deceased.

(Surrogate's Court, Chenango County, April, 1898.)

1. Trusts — Bequest to a town supervisor void for indefiniteness.

A bequest to the supervisor of a town and his successors in office of $5,000 in trust, "the interest or income only to be used in the support or relief of widows and fatherless and orphan children, in

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the town of Sherburne, as he, the said supervisor, may deem meet and proper," is void for indefiniteness.

2. Legacies — When a void legacy in remainder passes to other remaindermen whose legacies will otherwise abate, rather than to the residuary legatees.

The fifth clause of the will of a testator bequeathed to his wife the income of $40,000 for life and, after her death, directed its disposition among various legatees, including the town supervisor aforesaid, but, through an error of the testator, these gifts, as stated in his will, amounted to the sum of $44,000. He further directed that the legacy to his wife should in no case abate. The will contained a residuary clause.

Held, that the residuary legatees were not entitled to the void legacy of $5,000 to the town supervisor.

That as the mistake of the testator as to the total of his legacies would necessarily cause a deficit in the case of the other legatees, so much of the $5,000 as was necessary should be applied to their legacies to the end that his manifest intention, that they should receive full payment of the sums given to them, might be respected.

JUDICIAL settlement of the accounts of an executor.

D. L. Atkyns (Howard D. Newton, of counsel), for executors.

Charles A. Fuller, administrator, etc., attorney in person.

Stephen Holden, for George L. Sholes, supervisor, etc.

Henry A. Davis, for Utica Orphan Aslum.

GLADDING, S. This is a proceeding for an accounting by the surviving executors of the will of Devillo White, deceased, respecting only a fund of $40,000 mentioned in the fifth clause of his will.

Devillo White died at Sherburne, in this county, on the 10th day of May, 1882, leaving a holographic last will and testament dated December 6, 1882 (evidently a mistake in its date) and which was proved and admitted to probate May 31, 1882.

By the first four clauses of his will he bequeathed certain specified properties to his widow Caroline White and to L. S. Shipman, Henry C. Lyman and William A. Lyman, and then in the fifth clause of his will bequeathed the interest on the sum of $40,000

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to his wife during her life and at her death bequeathed the same to fourteen legatees, the said fifth clause being as follows::

"Fifth, I give and bequeath the interest or income on Forty Thousand Dollars to my well-beloved wife Caroline, during her natural life, and hereby direct my executors, hereinafter named, to pay to her, my wife Caroline said interest or income every six months upon taking her receipt for the same and I do further herein direct and declare that the provisions in this my will contained, for the benefit and maintenance of my well-beloved wife Caroline and the various gifts and bequests herein made to her, or for her benefit, are to be received by her and are to be in lieu of dower in any and all my property I may be seized or possessed at the time of my decease. And on decease of my said wife Caroline, I do hereby give and bequeath the said Forty Thousand Dollars and accrued interest or income so held in trust by my executors or their survivor or survivors to the Talladega College of Alabama (5) five thousand dollars; to the Congregational Church in the village of Sherburne (5) five thousand dollars; to the Methodist Episcopal Church in said village of Sherburne (3) thousand dollars; to the Universalist Church in said village of Sherburne (2) thousand dollars; to the Baptist Church in said village of Sherburne (1) one thousand dollars; to the Protestant Orphan Asylum of the City of Utica (1) one thousand dollars; to the Supervisor of the town of Sherburne and his successors in office (5) five thousand dollars in trust, the interest or income only to be used in the support or relief of poor widows and fatherless and orphan children in the town of Sherburne as he, the said Supervisor, may deem meet and proper.

"To Charles Lyman Carrier one thousand (1) dollars. To Devillo White, son of Alexander White (5) thousand dollars. To M. D. Botsford (5) five thousand dollars. To Alexander White (5) five thousand dollars. To L. S. Shipman (2) thousand dollars. To Ellen Van Keuren (2) two thousand dollars. Annie R. Botsford (2) two thousand dollars."

By the succeeding clauses of his will he created several trusts and gave numerous legacies and specified properties, to a large number of legatees therein named and then follows the fourteenth and fifteenth clauses of the will which are as follows:

"Fourteenth Clause, I hereby order and direct that if my estate is not sufficient to pay all the legacies above mentioned in full they are to be paid *pro rata*, excepting the legacy of $40,000 to my wife Caroline.

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"Fifteenth, I give and bequeath to my executors hereinafter named all of the rest residue and remainder of my estate in trust to sell and collect the same and pay L. S. Shipman (2) two thousand dollars and finally divide the balance into eight (8) equal parts and shares and give them to Rush W. Carrier, Henry C. Lyman, William A. Lyman, Asa White (son of Richmond White), Devillo W. Corbin, Chester W. Corbin, Fred White, Ralph J. White, each one part or share."

The executors had a judicial settlement of their accounts which resulted in a decree being entered March 2, 1885, leaving in their hands only the sum of $40,000 mentioned in said fifth clause.

Caroline White, the widow, died December 6, 1897, and this proceeding is now taken to procure an accounting and a decree distributing the said $40,000 which the executors have held in trust pursuant to said fifth clause.

It will be observed that the sum of the several legacies bequeathed in and by said fifth clause as hereinbefore recited amount to the sum of $44,000, and it appears, upon an examination of the original will, that the testator had attempted to change two of the said bequests as originally made by him, and had written upon the margin of his will "These interlinings were made by me, Devillo White, before signing," and if his attempt had been effectuated the sum of the bequests would have equaled $40,000; but upon probate of the will it was adjudicated that the bequests were as above recited.

Several questions are involved respecting a distribution of said $40,000.

First, it is claimed that the bequest to the supervisor of the town of Sherburne is void for indefiniteness and for other reasons alleged.

I think that such claim is well founded and that the attempted bequest of $5,000 to the supervisor of the town of Sherburne is invalid. Fosdick v. Town of Hempstead, 125 N. Y. 581; Rose v. Hatch, id. 427; Read v. Williams, id. 560; Holland v. Alcock, 108 id. 312; Iseman v. Myres, 26 Hun, 651; Hope v. Brewer, 136 N. Y. 126; Edson v. Bartow, 10 App. Div. 104; People v. Powers, 147 N. Y. 104; Butler v. Trustees, 92 Hun, 96.

Such bequests being void, the second and principal question is whether the $5,000 thereby attempted to be bequeathed, passes wholly to the residuary legatees, or, whether the other thirteen legatees are to receive the full amount of their legacies, and thereafter the overplus, only, passes to the residuary legatees.

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Counsel for the executors claim that under this will the void legacy to the supervisor vested at once upon the death of the testator in the residuary legatees, or else, in his next of kin, and he cites numerous authorities holding that, in wills, where there is a general residuary clause, the lapsed or void legacies pass to the residuary legatees. But an examination of these cases discloses the fact that the question decided by them arose, generally, between the residuary legatee and the next of kin and did not arise as between general legatees and residuary legatees.

As between general legatees and residuary legatees, I apprehend that the contrary is the correct rule; that the presumption, both in law and equity, is in favor of general legacies; that the residuary legacies embrace only that which remains after all the bequests of the will are discharged and the debts of the testator are satisfied, and that a strict residuary bequest must defer to general legacies and can only be paid after all such claims are satisfied. Redfield Surrogate Courts (5th ed.), 625. As before stated, the rules of construction which have been adopted to the contrary have arisen in controversies between residuary legatees and next of kin, and it has been universally held, in cases where there did not appear to be any deficiency of assets to pay the general legacies and there was a general residuary clause, that lapsed and void legacies go to the residuary legatees. In order that there should be a residuary estate, the provisions of the will must be fulfilled and something must be left over. This rule requires that all the debts and general legacies should be paid in full before there is any residuary estate. It is difficult for me to understand how it can be consistently claimed that there is a residuum until the debts and general legacies have been satisfied in full.

In the case at bar, the testator has effectually disposed of $39,000 of this $40,000 fund. It is true he attempted to dispose, as the will was probated, of $44,000. By reason of this discrepancy this controversy arises. If the sum of all these fourteen legacies amounted to $40,000 only, there would have been no question here to discuss, and no doubt but that the void legacy would pass to the residuary legatees.

In considering this question, it is necessary to bear in mind that the testator supposed all of his bequests to be valid, and this being so, he never intended that any part of this $40,000 should pass to his residuary legatees. As before stated, the question does not arise between the residuary legatees and the next of kin, but comes

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up between the residuary legatees and other general legatees whose legacies are unpaid. As between general legatees, whose legacies are unpaid in whole or in part, and residuary legatees, lapsed or void legacies go to make up the deficiency in paying the general legacies.

It appears to me that this question should be disposed of precisely in the same manner as it would be had the testator died leaving a will, the whole of which consisted in giving his widow the income of his entire estate for her life, and subject thereto, making the fourteen bequests specified in the fifth clause, and then a residuary clause; and then, upon a settlement of his estate, there should be found to be but $40,000 for the payment of the legacies. Can it be doubted that in such case the thirteen legatees, other than that to the supervisor, would have received the $39,000 bequeathed to them, and that the $1,000 over only would pass to the residuary legatees?

I am unable to see any distinction between such a case and this, unless it be in the fact that, in the case supposed, the testator could not be said to have known that his estate would yield but $40,000 to pay the $44,000 of legacies, while in this case the testator knew that by the fifth clause he had only $40,000 to bequeath. In the one case the testator makes a mistake as to the amount he has to bequeath, and in the other case the testator makes a mistake in the amount of his bequests. In either case he intends to give to each legatee the sum specifically bequeathed to him, and in both cases the legatee is prevented from receiving that sum only by the insufficiency of the fund from which it must be paid. In either case the amount of a void or lapsed legacy should go to complete the intention of the testator in respect to the general legacies, before reaching the residuary clause, which operates only to transfer to the residuary legatee such portion of the testator's property as he has not otherwise validly disposed of. Riker v. Cornwell, 113 N. Y. 124.

The question is not whether the amount of the void legacy to the supervisor is undisposed of by the will, or, because so, passes to the next of kin, but it is whether the void legacy, which by the testator was made payable from the principal fund of $40,000, shall go to the other thirteen legatees of that fund whose legacies, by reason of the mistake of the testator, cannot otherwise be paid in full, or shall be taken altogether out of that fund and away from the legatees between whom the testator intended and undertook to

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divide it, and carried to the general residuary legatees whom the testator never intended should receive any part of it.

He undertook to divide the principal fund, and the whole of it (which he had separated from all the rest of his estate) among fourteen legatees. However, by reason of what we may call a mistake of his, they would each receive only about 90 per cent. of the amount actually bequeathed to them, if all of the fourteen legacies were valid; but one legacy is void, and by reason thereof, there *is* enough to pay the other legacies in full. The scheme and intention of the testator was to divide the *whole* $40,000 among these fourteen legatees *and to give each one the amount named by him.* There is clearly discernible an actual active intention on the part of the testator that each of the fourteen should share in the $40,000 *to the amount of his legacy.* It is just as clear that he had no intention that either of the residuary legatees should have any part of this $40,000. To now carry $5,000 of it over to such residuary legatees, and leave *thirteen* of the fourteen intended beneficiaries of the $40,000 short of the amounts bequeathed to them, would clearly subvert the intention of the testator in respect to each and every one of the thirteen legatees, whose legacies are valid bequests.

When a principal fund, or a particular estate, is to be distributed among certain persons in amounts named, pursuant to testamentary bequests, so long as there is sufficient to pay all of the valid bequests in full, there can be no ground upon which they should be required to abate, even though the amount would have been insufficient if all had been valid.

The ordinary general residuary clause of a will, such as in this case, is for the *overflow* after all other general bequests have been satisfied in full.

I think these views are substantiated by the cases of Wetmore v. St. Luke's Hospital, 56 Hun, 313, and Gilbert v. Taylor, 76 id. 92.

In the latter case the court says, "The residuary legatee takes only what is left after all other legacies given by the will have been paid," and quotes with approval this language from Wetmore v. St. Luke's Hospital: "In order that there should be a residuary estate the provisions of the will must be fulfilled, and something must be left over. Debts and legacies must be paid, and then the residuum goes to the residuary legatees. But until the debts and legacies are paid it is difficult to see how, under the residuary clause, residuary legatees are entitled to receive anything."

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The argument of the learned counsel for the executors is, as I understand it, based wholly upon the proposition that the testator (1) only gave each of the fourteen legatees 90 per cent. of the amount he names for them, and (2) that he only intended to give to them that percentage. From these two propositions he draws the legal conclusion, that, having given them only that percentage, the void legacy cannot be taken to "augment the amount of their gifts."

The trouble with his conclusion is, that neither proposition upon which it rests is correct. The testator actually, in his will, bequeathed to each legatee named in the fifth clause the sum which they now claim, and it is equally certain that such bequest represented his actual intention. The trouble is, not that it was not bequeathed to them, and that he did not intend to bequeath it, but simply in the fact that there was not enough of the fund to satisfy his bequests if all had been valid. The argument of counsel seeks to make the deficiency in the fund do the double duty, of cutting down the amount actually bequeathed in the testator's own words, written by his own hand, and of construing his intention to have been other than his plain words necessarily import. He seeks to make the mistake in figures, and the failure on the part of the testator to notice that the sum of the fourteen legacies was greater than $40,000, a basis for saying that he neither bequeathed, nor intended to bequeath, the sums which the will specifically names as bequests to these legatees. While conceding that the excess in the legacies over the amount of the fund was a mistake on the part of the testator, he endeavors to make that mistake, which the testator died without discovering, or discovering that he had not rectified it, the foundation and only support of his next claim, viz.: that the testator did not intend and did not in fact give but 90 per cent. of the legacies now claimed; — that when the testator said, "I give and bequeath to the Congregational Church in the village of Sherburne, five thousand dollars," he only intended to bequeath, and did in fact only bequeath, that church $4,500.

On the contrary, it seems clear that he did bequeath the exact sums these legatees now claim, and he did intend to bequeath it to them, and it is the fact of the deficiency in the fund, and that fact alone, of which he knew not, which raises any question as to whether his clear and plain intentions, emphatically expressed in his will, can be carried out. It is true that if all of the legacies

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had been valid the intentions could not be carried out. By reason of one being void, his certain intentions can be carried out in respect to thirteen of the fourteen legacies involved in the fifth clause.

Counsel argues that it was the intention of the testator that each legacy "should abate equally, because he had disposed of four thousand dollars more than the fund." I cannot assent to any such proposition and I am loth to believe that the counsel means to assert that the testator had any such actual intention. He probably means to argue that such is the law applicable, because of the testator's mistake. It would be imputing the grossest absurdity to a man of strong character, wide intelligence and great practical experience, to say this testator deliberately considered and formed such an intention. It is impossible to predicate such an intention upon the conditions of the fifth clause without, at the same time, asserting that that, which all have treated as a mistake, was purposely done.

As before stated, it cannot possibly be said that this testator had an actual active intention that any part of this $40,000 should go to his residuary legatee. Such an event was wholly without and beyond his contemplation. He gave it all away to others and more too, and except for the latter fact no controversy would now arise respecting it.

On the other hand, it is just as certain that he did have an actual active intention that each of his designed beneficiaries, of that fund, should receive the amount which he explicitly directed should be paid to them therefrom. To that point his thoughts and purposes were directed, and the amount going to each particular legatee passed under his consideration and received his sanction and approval. It is true that he made a mistake in the aggregate amounts bequeathed. But, notwithstanding that mistake, it is still possible, by reason of the void legacy, to carry out his intentions as to all but one of the fourteen legatees named. The fulfillment of this clear intention works no harm to that one. *He* neither receives more nor less by reason thereof. Thereby right and justice, according to the intention of the testator, is done to the thirteen and no wrong to the other. The latter is deprived of the benefit of his legacy by reason of a rule of law which the testator knew not of. By this construction the residuary legatees do not receive any part of the $40,000 until all of the valid legacies have been paid in full. They can find no fault with a rule so clearly in ac-

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cordance with the emphatically expressed intention of their testator. There is no case holding to the contrary of this construction, and there never should be, because such a holding would subvert the intentions of the testator and would be contrary to the plain justice and right of the matter. Van Kleeck v. Dutch Church of New York, 20 Wend. 457, was a case where the devisee was by law incapable of taking, and the court held that the devise did not go into the residuum, because, upon a review of the whole of the will, including the void clause, such did not appear to be the intention of the testator.

In King v. Woodhull, 3 Edw. Ch. 79-82, the court says: "It may be argued in most cases that the testator does not mean that the residuary legatee shall take what is previously given from him, for he does not contemplate the case." And this was quoted with approval in Morton v. Woodbury, 153 N. Y. 254.

"Residue means all of which no effectual disposition is made by the will other than by the residuary clause." 1 Jarman on Wills, 764.

The testator had effectually, by valid legacies, given away $39,000 of the $40,000 fund, leaving only $1,000 to fall into the residuum.

There is no question involved here requiring any distinction to be drawn between the actual intention of the testator and the legal intention to be imputed. The language of the will is plain and unambiguous, and his actual intention, when ascertained, becomes his legal intention, and it is the duty of courts to divide this fund among the legatees whom he said should share it, in precisely the amounts he said each should have, in respect to every valid legacy thereby given, so long as the amount of the fund is sufficient to pay each valid legacy in full.

Counsel for the executors refers to the case of Wetmore v. New York Institution for the Blind, 3 N. Y. Supp. 179, and asserts that it is "a direct adjudication that the void legacy in this case cannot go in augmentation of others abating, but must pass under the general residuary clause." That case is instructive and properly cited in his argument, but, in my opinion, is not an adjudication upon the point. It was an action brought for the construction of the will of Mary Hopeton Drake. Her will contained three residuary clauses, and the court held that under the particular language of the will it was not the *intention of* the testatrix that the amount of lapsed legacies in the seventh clause should go to make

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up the abated legacies in the eighth, and, therefore, they should fall into the general and last residuary.

That will of Mary Hopeton Drake has been passed upon three times by the Supreme Court since then. See United States Trust Co. v. Black, 3 N. Y. Supp. 453; affirmed, 31 id. 1134; Wetmore v. St. Luke's Hospital, 56 Hun, 313, and Gilbert v. Taylor, 76 id. 92. The two last cases are more nearly in point here and the principles enunciated are in accord with those which lead me to the result herein indicated.

Decreed accordingly.

Matter of the Settlement of HENRY MERVILLE, a Poor Person, Between the TOWN OF WARREN, Respondent, and THE TOWN OF GERMAN FLATS, Appellant.

(County Court, Herkimer County, April, 1898.)

Poor Law — Contest as to settlement of a poor person — Service of notices.

The provisions of the Poor Law (Laws of 1896, chap. 225, § 43), in regard to the time within which notices, to be given by towns contesting the settlement of a poor person, must be served are mandatory and a failure to comply with the statute must result in the defeat of the town so failing.

This is a contest between the towns of German Flats and Warren, in Herkimer county, over the settlement of a poor person and the attendant liability for support and relief furnished him as such.

J. B. & J. E. Rafter, for appellant.

Steele & Prescott, for respondent.

DEVENDORF, J. The town of German Flats originally commenced these proceedings by serving a written notice upon the overseer of the poor of the town of Warren, requiring him to provide for the support and relief of a poor person who was then in the town of German Flats and applying for aid and relief therein, as such; thereupon the overseer of the poor of the town of Warren within the time provided by law served upon the overseer of the town of German Flats the counter notice of contest of alleged set-

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tlement as provided by section 43 of chapter 225 of the Laws of 1896, known as the "Poor Law," and thereafter a hearing was had before the superintendent of the poor of the county and a decision rendered therein by him, determining that the legal settlement of such poor person was not in the town of Warren.

The appeal herein was taken from that decision.

It appears from the evidence before the court that the poor person formerly resided in the town of Warren and removed to German Flats in March, 1896, and application in his behalf was made for aid to the overseer of the poor therein not later than March 22, 1897, and aid was actually furnished pursuant to such application March 25th, and on Sunday, April 4th, following, the overseer of the town of German Flats served a notice upon the overseer of the town of Warren, requiring him to provide for the support and relief of such poor person.

The respondent at the outset raises the question before this court, that the notice served by the overseer of the poor of the town of German Flats was not served within the time prescribed by the statute, and, therefore, this proceeding cannot be maintained to fix a liability for such aid and relief upon the town of Warren; consequently, the only question at this time presented is as to the effect of the failure on the part of the overseer of the poor of the town of German Flats to give the notice within the time prescribed by section 42 (subdivision 4) of the Poor Law.

In the county of Herkimer the respective towns are liable to support their poor, and in that case the statute provides, that where a poor person has gained a settlement in a town other than that in which he may be when he applies for relief he shall be supported nevertheless by the town where he may be, and the overseer of the poor *shall within ten days after the application* for relief give notice in writing to the overseer of the town to which such poor person shall belong, requiring him to provide for the support and relief accordingly, who shall then within ten days thereafter, if contest is desired, give a counter notice of contest, as prescribed by section 43 of said act.

This court, therefore, is not called upon to say at this time whether the poor person has or has not gained a settlement in either of said towns, but the question now to be determined is, whether these proceedings can be maintained, based upon a notice pursuant to section 42 of the Poor Law, served more than ten days after the application for aid and relief was made.

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The proceeding is entirely statutory in its character, and if the town of Warren is to be made liable for the support and aid given to a person then being and residing in another town, it must be by virtue and force of the statute, and the statute having prescribed the practice whereby that end is reached and the questions at issue between the respective towns determined, I think in order to bring about that result both parties must in their practice follow the line designated by that statute.

If the town of German Flats granted aid to a poor person within its borders who it claims had a legal settlement in another municipality, it must within ten days after the application for relief serve the notice prescribed by subdivision 4 of section 42 of the Poor Law.

I think the statute in that respect is mandatory and not merely directory, at least it appears such construction fully protects the rights of both municipalities.

The appellant cites People v. Allen, 6 Wend. 486; Looney v. Hughes, 26 N. Y. 514, and many cases in line with them, which hold in effect, that where a statute specifies a time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory merely, unless the nature of the act to be performed or the language used by the legislature show, that the designation of the time was intended as a limitation of the power of the officer, and that the public interests are not to suffer by the laches of a public official.

It appears those cases are clearly distinguishable from and the principle there settled does not apply in appellant's favor to this case; here the public at large is not interested, but municipalities are, and as such are arrayed against each other, and the question to be determined is as to their relative rights.

It can be as well said that the public is interested upon either side.

If an official of a municipality has an act to perform whereon a right is to be claimed under a provision of the statute to a recovery against another municipality such act must be performed within the time and as prescribed by the statute, and I do not think that the statute in such a case can be deemed merely directory and not mandatory, under the well-known principle established by the cases above referred to.

While section 42 does not prescribe, as does section 43, the penalty or consequence of a failure on the part of the overseer to

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serve the notice within the ten days, yet, I believe, to entitle him to maintain proceedings to fix the liability upon another town, his notice must be served within such ten days.

It may be that at any time subsequently and before a settlement is gained when relief is asked for, that he could give notice within the ten days of such application and maintain a proceeding to establish the liability of another town, where it is alleged the poor person had gained a settlement, but possibly would lose the right to recover for the relief theretofore granted, and for which no notice had been served within ten days of such application therefor.

It appears to have been the intent of the legislature to give the town to which the poor person is alleged to belong early notice of the application for aid, and the statute also simplifies the contests arising in such matters and prescribes a certain practice to be followed in order that the disputes arising over the settlement of poor persons may be determined and the liability therefor placed.

The conclusion is, therefore, reached, that it is incumbent upon the parties to these proceedings in order to maintain them, to serve the respective notices prescribed by the statute within the time provided for thereby; a failure to do so must necessarily result in the defeat of the party so failing.

Whether the poor person is or is not settled in either of said towns cannot be, and is not determined by this proceeding, but for the reasons stated, the appeal herein and the proceedings upon which it is founded are dismissed, with costs in favor of respondent.

Appeal dismissed, with costs in favor of respondent.

THE CITY OF HUDSON, Appellant, *v.* WILLIAM GRANGER, Defendant.

(Supreme Court, Albany Special Term, April, 1898.)

Violation of a city charter — When punishable criminally only.

A violation of a city ordinance made punishable by a maximum fine, or in the alternative, by certain imprisonment, is properly prosecuted as a crime, and the fact that the charter permits the common council to sue, in the name of the city, any person violating any city ordinance "to recover the penalties therein prescribed," does not change the character of the proceeding from criminal to civil.

Such a construction is particularly proper where the entire proceeding has been conducted according to criminal procedure.

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THIS is an appeal from a judgment of the City Court of the city of Hudson, acquitting the defendant of a charge of having violated a city ordinance, and is entitled in the return as above. A certificate of disqualification having been duly filed by the county judge the appeal comes here for hearing and decision.

Samuel B. Coffin, for appellant.

Edward F. McCormack, for defendant.

FURSMAN, J. The charge against the defendant is the violation of an ordinance of the city of Hudson, forbidding any person not designated or employed for that purpose by the common council from interfering in any manner with the fire alarm system of the city. The proceeding taken before the city judge was in no just sense a civil action. It was not of such a character that a judgment could be rendered, and an execution issued thereon as in a civil action. The whole conduct of the case from beginning to end followed the methods of criminal procedure, and was not in the least in conformity to the practice in civil actions. There was no complaint or answer; there was instead an "Information" of the precise character defined in section 145 of the Code of Criminal Procedure. The warrant issued was in form a criminal and not a civil warrant. It did not require the defendant to answer the city of Hudson, as in a civil action. It is addressed to "any peace officer," etc., and commands that the defendant when arrested shall be brought before the magistrate issuing it, or in case of his absence, etc., "before the nearest or most accessible magistrate in the county," a requirement that is peculiar to criminal and not at all applicable to civil warrants. The return shows that on being brought before the magistrate the defendant entered a plea of not guilty,— a plea entirely unknown in civil actions,— and on the information, and this plea he was tried and acquitted. Had he been convicted, an execution could not have been issued as in civil actions, but a warrant of commitment, as in criminal cases, would have been the only possible means by which to enforce the judgment. Every step taken was applicable to a criminal procedure, and none were applicable to a civil action. Moreover, the proceeding was not to recover a penalty, but to cause to be imposed upon the defendant a fine, and in default of payment, imprisonment "not exceeding one day for each dollar" of the fine imposed "pen-

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alty" and "fine" are not in law the same. A penalty is always recoverable in a civil action; a fine never is. A penalty, when recovered, goes to the party suing; a fine to the people, though, in order to take fines imposed for violating ordinances of the city of Hudson, out of this general rule, an express provision was inserted in the charter requiring them to be paid to the city treasurer. A fine is defined in law to be "a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor." Bouvier, title, "Fine." This definition is wholly inapplicable to a judgment in a civil suit. Now, the ordinance in question does not impose any penalty for its violation, nor does the city charter impose any. Section 65 provides that any violation of any ordinance "shall be punishable by a fine not exceeding $25, or by imprisonment until the same shall be paid, not exceeding," etc. This is not a penalty recoverable in a civil action, but a punishment for crime. A penalty is fixed and absolute, and when recoverable the recovery must be for the full amount. Nothing is left to the discretion of the court. But, under this section, the fine to be imposed is left wholly to the discretion of the court within the maximum limit of $25. The court may exercise mercy towards a person convicted under it, and fine him only $1, or even one cent. It is absurd to say that such a discretion could be exercised in a civil action to recover a penalty. It is true that section 63 provides that the common council may bring suit in the name of the city against any person violating any city ordinance "to recover the penalties therein prescribed;" but there is no penalty such as may be recovered in a civil action anywhere prescribed either in the charter or the ordinance itself. The proceeding, under section 65, is essentially and necessarily criminal in character. A civil action cannot be maintained under it. The only proper procedure is of a criminal nature, and that was pursued. The cases cited by the learned counsel for the appellant are not in conflict with these views. In Wood v. City of Brooklyn, 14 Barb. 425, the ordinance violated provided that every person offending against it should "forfeit and pay the sum of $50 for each and every offense." In the City of Buffalo v. Schliefer, 25 Hun, 275, the ordinance imposed a penalty of $10 for its violation, and the warrant required the defendant to answer the city of Buffalo. In all such cases the penalty is to be collected by a civil action. In the present case, however, there is no penalty that may be so recovered; there is only a discretionary punishment that may be inflicted as for the commission of a crime. Upon a

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judgment for a penalty in a civil action, an execution may issue upon which property may be seized, but upon a judgment of conviction, under section 65, property cannot be taken. If the defendant refuses to pay the fine imposed, the only alternative is imprisonment. Code Crim. Pro., § 487. This, therefore, was in every particular a criminal and not a civil proceeding, and was the only proceeding that could properly be brought. It follows that this appeal must be dismissed, and it is, therefore, unnecessary to decide the other questions in the case.

Appeal dismissed, with costs.

ALMON MILLER, Plaintiff, *v.* THE MILLER KNITTING CO. et al., Defendants.*

(Supreme Court, Columbia Trial Term, January, 1898.)

1. **Indemnity against liability — Actual damage need not be shown.**
An agreement of indemnity against liability differs from one against loss in that, in the former case, actual damnification need not be shown, and it is enough that liability is shown to have been fixed, e. g., by the protest of notes which the indemnified indorser has not yet paid.

2. **Same — Measure of damages.**
An indorser, indemnified by mortgage and who has begun its foreclosure, may recover, at the time of the decree, not only for notes as to which his liability has become fixed before action begun, but also for all notes protested before the granting of the judgment.

3. **Same — A corporate mortgage, given during insolvency but upon a promise made when solvent.**
Where the president of a solvent corporation promises a person that if he will indorse its notes to a certain extent, it will give him security, its subsequent execution, when insolvent, of a mortgage to secure him for indorsements so made, is not invalid as a transfer made by a corporation in contemplation of insolvency nor as a security given by it, when insolvent, with an intent to give a preference to any creditor over other creditors.

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* Received too late for insertion in proper place.—[Rep.

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ACTION to foreclose a mortgage.

John Cadman, for plaintiff.

A. Frank B. Chace, for receiver.

FURSMAN, J. In 1882 Samuel D. Miller was carrying on the knitting business at or near Mellenville, Columbia county, N. Y., and in November of that year executed and delivered to the plaintiff a mortgage upon his real estate to secure the plaintiff against loss by reason of his indorsement of the paper of Samuel "not exceeding $20,000 in the aggregate." Afterwards Samuel conveyed an interest in the mortgaged premises to his two sons, William C. Miller and Sanford S. Miller, and entered into copartnership with them in the same business under the firm name and style of Samuel D. Miller & Sons. The plaintiff indorsed paper to a large amount for Samuel, and after the formation of the copartnership continued to indorse the paper of the firm. In January, 1890, the copartnership members formed themselves into a corporation, under the name of The Miller Knitting Company, of which they were the only stockholders. Of this company, Samuel D. Miller was president. Upon the formation of the corporation the assets of the copartnership, including the real estate covered by the mortgage, were transferred to it, and as the paper of the partnership fell due that of the corporation was substituted for it. At this time and down to January, 1893, the corporation was solvent, but afterwards became insolvent, and was so at the time of the execution and delivery of the mortgage in suit, January 25, 1895. In February, 1895, a receiver was appointed on the petition of the corporation. At the formation of the corporation its president agreed with the plaintiff that the corporation would secure him by mortgage for all his indorsements of its paper, and, upon the faith of this agreement, the plaintiff indorsed such paper to an aggregate amount of $31,935.38. This indebtedness is represented by various notes now held and owned by the National Hudson River Bank, and the First National Bank of Hudson, respectively, and they are made parties to this action. On the 25th of January, 1895, the corporation, in pursuance of the agreement above mentioned, executed and delivered to the plaintiff the mortgage now sought to be foreclosed, conditioned that it should stand as a "security for the payment of all such sum or sums of money as said Almon Miller shall pay, or be

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liable to pay on account of indorsing," etc., not exceeding in principal $33,333. Upon giving this mortgage the former mortgage given by Samuel was formally canceled and satisfied.

The plaintiff has not paid any of the notes indorsed by him, and only one of them was due and under protest when this action was commenced, but all of the others had fallen due and been protested before the trial.

Upon these facts it is insisted on behalf of the receiver that this action cannot be maintained because, first, the plaintiff has not paid any of the notes indorsed by him, and has not, therefore, sustained any actual loss; and, second, that the mortgage was given when the corporation was insolvent, and is, therefore, invalid under the Revised Statutes (part I, chap. 18, tit. 4, § 4), forbidding any assignment or transfer by a corporation of any of its property, when in contemplation of insolvency, and declaring every such assignment to be absolutely void, and under the act of 1892 (chap. 688, § 48), declaring invalid any conveyance, assignment, or transfer of any property, and of any payment made, judgment suffered, lien created, or security given by any corporation when insolvent with the intent to give a preference to any creditor over other creditors.

In this case the condition of the mortgage is not a mere indemnity against loss, but is an indemnity against liability. There is a manifest distinction between an agreement to save harmless, and an agreement to save from liability. In the former case actual damage must be shown, while in the latter an action may be sustained without showing that the party has been indemnified. This distinction is very clearly pointed out in Gilbert v. Wiman, 1 N. Y. 550-553, where it is said that in a contract of indemnity where the obligation is to save the obligee from a charge or liability, the contract is broken when such charge or liability is incurred, but where the obligation is that the party indemnified shall not sustain damage by reason of any liability incurred, there is no breach until actual damage is sustained. The same principle is recognized in Crippen v. Thompson, 6 Barb. 532, 535; Rockfeller v. Donnelly, 8 Cow. 623; Chace v. Hinman, 8 Wend. 452; Kip v. Brigham, 6 Johns. 158; 7 id. 168. In Nat. Bank of Newburgh v. Bigler, 83 N. Y. 51, the condition of the mortgage was that it was to be a continuing security and indemnity against all liabilities the mortgagees had incurred, or might thereafter incur, as indorsers, acceptors, or sureties, in any form, and it was held that the mortgage was not one of indemnity merely, but was a security against all liabili-

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ties; that it was, therefore, not essential to a recovery to show that damage had been sustained, and that the right of the mortgagees to resort to the security arose when their liability as indorsers became fixed. See, also, Selover v. Harpending, 18 Abb. N. C., at page 253.

It is said, also, that inasmuch as only one of the notes was due when this action was brought a foreclosure cannot be had as to the notes not then due. All of them, however, are now due, and the plaintiff's liability thereon has become fixed by demand and notice. In Asendorf v. Meyer, 8 Daly, 278, it was held that in an action to foreclose a mortgage where only a part of the sum secured by it is due and payable at the commencement of the action, the court may make a decree of sale to cover not only that sum, but also such other sums as may be due at the time of making the decree. See Malcolm v. Allen, 49 N. Y. 448; and 2 Rev. Stat. 193, §§ 161-166.

As to the remaining objection insisted upon by the defendant receiver, I am persuaded that this mortgage is not within the prohibition contained in either of the statutes above cited. At a time when the corporation was solvent, its president agreed with the plaintiff that if he would indorse the paper of the company up to a certain specified amount the company would give him security therefor. Acting upon the faith of this promise, the plaintiff indorsed the notes proved in this action. After the company became insolvent, for the purpose of fulfilling the agreement thus made, it executed and delivered the mortgage in suit. The execution and delivery of the mortgage relates to the time of the agreement, and simply effectuates it. "The date of the agreement, pursuant to which any transfer is made, and not the day when the conveyance is in fact executed, is to be regarded." Paulding v. Chrome Steel Co., 94 N. Y., at page 340, and cases there cited.

Having acted upon the faith of the promise the plaintiff might have maintained an action to compel a specific performance of it, and this without regard to whether the company was solvent or insolvent. In Brower v. Brooklyn Trust Company, 50 N. Y. St. Repr. 630, the action was to set aside three mortgages given by the Ridgewood Ice Company (a corporation) to the defendant. One of these mortgages was assailed on the ground that it was made in anticipation of insolvency. It appeared that this particular mortgage was given in pursuance of an agreement made by one of the officers of the company to secure the mortgagee for certain loans. The General Term of the Second Department held that

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the corporation, having had the benefit of the loans, the authority of the officer to make the agreement could not be questioned, and, upon the authority of Paulding v. Chrome Steel Co., 94 N. Y. 334, that such a mortgage, though made when the company was actually insolvent, and known to be so, is not prohibited by the statute. See, also, Bream, etc. v. Merchants' Nat. Bank, 25 N. Y. St. Repr., at page 283. Where, at a meeting of the stockholders of a solvent corporation, it was voted to give a mortgage to secure bonds to be issued to a trustee to secure a debt to a bank for moneys already had and future loans, and the bonds were issued, but the mortgage was not executed until after the corporation became insolvent, it was held that the mortgage was valid, and was not in violation of the statute. Gunther v. Mayer, 51 N. Y. St. Repr. 538. In Elmira Savings Bank v. Davis, 142 N. Y. 590, the Court of Appeals, at page 596, adopt the language and approve the principle stated by Chief Justice Fuller in Scott v. Armstrong, 146 U. S. 499. "Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency and not in contemplation thereof, are not invalidated." The case arose under the National Banking Act, and the question was whether the State Banking Law, giving preference to savings banks in certain cases, was in conflict therewith. Section 5242 of the Revised Statutes of the United States (The National Banking Act) is as broad and stringent as the state laws above cited, but it was held that the national and state banking laws were not in conflict, and the preference was upheld. This principle applies to the present case. Here are equities "arising by express agreement," entered into at a time when the corporation was solvent, and when its action was in nowise affected by the statutes forbidding the transfer of property or giving security by insolvent corporations, or corporations contemplating insolvency. The giving of this mortgage was simply an honest fulfilment of such express agreement, and, though done after the corporation had become insolvent, it is not by that circumstance rendered invalid. Paulding v. Chrome Steel Co., 94 N. Y. above cited.

The notes in suit are still held and owned by the National Hudson River Bank and the First National Bank of Hudson who are par-

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ties defendant in this action. There can be no valid objection to a distribution between them of the moneys arising from the sale of the mortgaged premises under the foreclosure according to their respective rights. All the parties interested being before the court, a complete determination of the whole matter is proper. Code Civ. Pro., §§ 447, 452; Derham v. Lee, 87 N. Y. 599, 604.

Moreover, the right to foreclose for the payment of these notes, or for the protection of the plaintiff against liability upon them being established, the receiver has no interest in the question.

The plaintiff should have a decree of foreclosure and sale of the mortgaged premises, and a distribution of the avails between the defendants' banks, according to their respective rights, the overplus, if any, to be paid to the receiver.

Ordered accordingly.

EDWARD E. CADY, Plaintiff, *v.* THE BROOKLYN UNION PUBLISHING CO., Defendant.

(Supreme Court, Kings Trial Term, April, 1898.)

1. **Libel — By publishing of a dentist that he has committed suicide.**
   A false publication in a newspaper, of a practicing dentist that he had committed suicide, is libelous *per se*, both as touching him in his profession and generally.

2. **Same — Malice.**
   Malice in the defendant in speaking or publishing a slander or libel, which is not qualifiedly privileged, is not essential in order that the plaintiff may recover his actual damage. Malice in such a case has to do only with the question of smart money.

3. **Same — Slander.**
   The difference between libel and slander pointed out; also the difference between what constitutes libel in a civil and in a criminal action.

ACTION for libel. Motion on the minutes to set aside a verdict for the plaintiff on the ground that the words were not libelous *per se*, and that therefore, as no special damage had been pleaded, no cause of action was alleged; also on the ground that there was no malice. The alleged libel was a publication in the defendant's newspaper that the plaintiff, a dentist with an office and practicing

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his profession in the city of Brooklyn, N. Y., had committed suicide the day before, in Baltimore, Md., by shooting himself.

M. L. Towns, for plaintiff.

A. E. Lamb, for defendant.

GAYNOR J.: The trial proceeded mainly on the theory that the published words were libelous *per se* as touching the plaintiff in his profession, for to publish of him that he had committed suicide was at least as injurious to him in his profession as would be a publication that he had suddenly abandoned his home and practice and gone to parts unknown, and that would be libelous. But I think they were also libelous *per se* without regard to his profession. The words complained of are not libelous *per se* as charging a criminal offense, for suicide is not a criminal offense in this state (Darrow v. Family Fund Society, 116 N. Y. 537). It must therefore be owned that they are not libelous *per se* if the definition of libel which the learned counsel for the defendant cites as from the early case (1771) of *Onslow* v. *Horne* (3 Wilson, 177) be correct, for in no other respect than as charging a criminal offense could they come within such definition. That case has recently been cited by high judicial authority in the same way and to the same effect as the learned counsel cites it, viz., in the dissenting opinion in *Gates* v. *N. Y. Recorder Co.* (155 N. Y. p. 234), and I suspect that the learned counsel cites it therefrom at second hand, for the truth is that the court did not in *Onslow* v. *Horne* define or pass upon libel at all, but had to do with a judgment for damages for slander only, and professed to define slander only. In the said dissenting opinion it is said: "This court, in a recent case, adopted the classification of actionable words as defined by Chief Justice De Grey in the leading case of *Onslow* v. *Horne* (3 Wilson, 177). According to that classification actionable words are those which (1) import a charge of some punishable crime; (2) impute some offensive disease which would tend to deprive a person of society, or (3) which tend to injure a party in his trade and occupation or business, or (4) which have produced some special damage (Moore v. Francis, 121 N. Y. 199). The words complained of in this case do not fall within any of these classes, except the last, and if actionable only by reason of special damage, that was neither alleged nor proven."

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The case before the court was one of libel, and the application of this cited definition to the alleged libelous words, in order to exclude them from the category of words libelous *per se*, seems to have been inadvertent, for the said definition is not of libel, but only of slander, as I have already said, and it is so given in *Moore* v. *Francis*. It is there stated as the rule for "actionable slander", not "actionable words." Although the said definition or classification is given in *Moore* v. *Francis* as from *Onslow* v. *Horne*, I may mention as a mere aside in passing, that it is not to be found there at all. Presumably the citation was made at second hand from some careless source. The learned and able judge in the *Gates* case continues as follows: "Formerly words imputing unchastity to a female were not actionable *per se*, but only when special damages were alleged and shown as the direct result of the charge (*Pollard* v. *Lyon*, 91 U. S. 225; *Bassell* v. *Elmore*, 48 N. Y. 561; *Terwilliger* v. *Wands*, 17 N. Y. 54; *Wilson* v. *Goit*, 17 id. 442; *Williams* v. *Hill*, 19 Wend. 305; Odgers on Lib. & Slan. p. 84). But the rule was abrogated in this state by statute (Laws of 1871, ch. 219; Code, sec. 1906). And yet this court held, after the rule was abolished, that words infinitely more injurious to a female than those complained of in the case at bar were not actionable, without allegation and proof of special damage as the direct result of the words (*Anon.*, 60 N. Y. 262)." Subject to correction, I may say that this seems to me a continuance of the inadvertence, for I own that I had never before run upon a suggestion that written words imputing incontinence to a woman, or even to a man (More v. Bennett, 48 N. Y. 472), were not libelous *per se* at common law; and it was with a question of libel that the learned judge was dealing. He was engaged in showing that the printed words, there alleged to be libelous, did not come within a definition taken and accepted by him as the definition of libel, but which was in fact only the definition of slander. Such spoken words do not constitute slander *per se* at common law; but is there any question of their constituting libel *per se* if written and published? It seems trite to mention the difference between slander and libel. From early times the rule is of familiar statement, that not only do oral words which amount to slander *per se* constitute libel *per se* if written, but that in addition any written words soever which hold one up to disgrace, hatred, ridicule or contempt, are libelous *per se*, however much they may fall short of charging a criminal offense, or of amounting in any other respect to slander

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if only spoken. Citation for this is unnecessary, and is made only from habit (3 Bl. Com. 125; Steele v. Southwick, 9 Johns. 214; Southwick v. Stevens, 10 Johns. 442; Moore v. Francis, 121 N. Y. 199; Odgers, ch. 2, p. 21). And upon referring to our statute which the opinion cites, it will be seen that it in terms only enabled a woman to maintain an action "for words hereafter spoken" imputing unchastity to her, without proof of special damage. In other words, it made such spoken words slanderous *per se*, which they were not at common law. It did not embrace the case of such words when written, for they were libelous *per se* by the common law, and no such enabling legislation was needed in respect of them. There being no such statute in reference to such words if written, they are now actionable *per se* if spoken, but not if written, unless by the common law; and who ever suggested that they are not? All of the cases cited in the part of the said opinion last above quoted, are of slander; and later on the recent slander case of *Hemmens* v. *Nelson* (138 N. Y. 517) is cited. Probably the words there, and without doubt the words in *Anon.* (60 N. Y.), referred to by the learned judge as so infinitely more injurious than those he was construing, would be libelous *per se* if written. In fine, throughout the opinion, the definition of slander is applied to libel. Nothing said therein may, therefore, serve as authority or help here.

I find only one case similar to the present one, viz., *McBride* v. *Ellis* (9 Rich. [South Car.] 313). There a simple obituary notice or advertisement in a newspaper, only stating name, residence, age and day of death of the plaintiff, who was in fact alive, was held in an action for damages to be libelous *per se*, in that it exposed the plaintiff to ridicule. But if the view there taken be correct, that a finding of malice in the defendant by the jury was necessary in order to give a verdict for the plaintiff, the charge on that head in the present case was erroneous. The stress of the charge and of the opinion there was that the matter had to be published maliciously to be a libel, and the head note is: "An obituary notice of one living, if conceived and published falsely and maliciously, is a libel." But malice in the defendant is not, and never was, an essential ingredient in an action for damages for an ordinary libel or slander. It is only necessary where the occasion of the speaking or publishing of the defamatory words was qualifiedly privileged. There malice in the defendant has to be shown, and is a necessary ingredient of the cause of action, in order to defeat the privilege. The common saying that malice is essential to maintain all civil ac-

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tions for slander or libel is an inadvertence, and no judge or writer who has considered it has accepted it. It is folly, for no matter how good one's motives may have been in speaking or publishing unprivileged defamatory matter, that constitutes no defense to an action for damages therefor. No verdict for the defendant in a civil action for ordinary libel or slander could stand upon a charge by the trial judge to the jury, that if they found no malice in the defendant the verdict must be for the defendant. That is the charge for a criminal case, but not for a civil case, unless it be one of qualified privilege. And the long struggle to have the libel depend upon malice even in criminal cases, and to have that question submitted to the jury, makes one of the most interesting chapters in the history of our individual rights. Malice in a civil action for unprivileged libel or slander has to do only with the question of whether smart money may be awarded in addition to the actual damage. It has always seemed strange to lawyers that some text writers and judges in defining libel in reference to civil actions should quote *Hamilton's* definition of a criminal libel in his argument in the criminal case of *The People* v. *Croswell* (3 Johns. Cas. p. 354), viz.: "A libel is a censorious or ridiculing writing, picture or sign, made with a mischievous and malicious intent towards government, magistrates or individuals." (See incorrect quotation of it in *Moore* v. *Francis*, p. 204). A libel to be a criminal offense must be published with a "mischievous and malicious intent", or maliciously; but not so in order to sustain an action for damages, and *Hamilton* never thought of saying so, much less of forever being quoted as having said so. Failure to keep in mind the difference between a criminal and a civil action for libel on this question of malice, has led to most of the vexation and confusion about malice in civil actions; and like failure to observe such difference as between qualifiedly privileged, and unprivileged, utterances or publications, is responsible for the rest of it (Prince v. Brooklyn Eagle, 16 Misc. Rep. 186; Ullrich v. New York Press Co., 23 Misc. Rep. 168; Shanks v. Stumpf, 23 Misc. Rep. 264). In the said dissenting opinion in the *Gates* case from which I have quoted, it is said (p. 240): "without malice, express or implied, there could be no libel"; and that, it is said, "would defeat the action." In *Moore* v. *Francis* the contrary is most explicitly said, viz.: "The evidence renders it clear that no actual injury to the plaintiff was intended by the defendants, but it is not a legal excuse that defamatory matter was published accidentally or inadvertently, or with

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good motives and in an honest belief in its truth" (p. 207). That the defendant is liable for the actual damage done by the speaking or publishing of the defamatory matter, even though he spoke or published it "with good motives", but that nevertheless he is not liable if he spoke or published it "without malice", is a self-contradictory proposition. Such coupling together of "good motives" and "malice" is a confusion of ideas originating in the failure to distinguish which has already been mentioned. Surely, we are not to be authoritatively told, that although the defendant's motives are in fact of no consequence on the question of maintaining the action, it is nevertheless necessary for the trial judge and jury to conjure up, "imply", and falsely attribute to the defendant an imaginary, fictitious, sham and wholly non-existing malice, in order to avoid granting a non-suit or rendering a verdict for the defendant. Such a proposition is without support in reason, and is current at all only from the mass of unconsidered *dicta* which text writers, and, as must be owned, some judges, have collected and apparently credited. If an instance of a civil action for slander or libel could be found, where there was a non-suit or a verdict for the defendant on the ground of no malice in the defendant, unless in a case of qualified privilege, it would be of no authority whatever. Even a lunatic, who is incapable of motive or malice, and therefore not liable to smart money, is liable for the actual damage done by his libels or slanders, the same as for his other torts (Ullrich v. New York Press Co., *supra;* Hatfield v. Roper, 21 Wend., p. 620).

I think the effect of the publication concerning this plaintiff must have been to subject him to general ridicule, which in legal presumption causes damage, and that makes it libelous *per se*. Everybody would say of him: "There goes the dentist who committed suicide." His profession, or craft, was properly considered on the question of how much actual damage must have been caused to him by the publication.

The motion is denied.

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MARY G. KEELER, Plaintiff, *v.* VICTOR HOLLWEG et al., Defendants.

(Supreme Court, Kings Trial Term, April, 1898.)

Principal and surety — A change in collateral security, not prejudicial to indorsers, made without their knowledge or consent.

The act of the assignee of an indorsed note in releasing, before the note became due, chattel mortgage security given to her assignor by the makers of the note and assigned to her, and in taking, in lieu thereof, a new chattel mortgage upon the same property and upon the same terms, can afford no defense to the same indorsers of a renewal note who, when they indorsed it, were ignorant of the change which had been made in the chattel mortgages as, in the absence of proof of any damage to them, the court cannot assume that they have been prejudiced by the change.

ACTION upon a promissory note, against the two makers, and the two payees as indorsers. The two indorsers answer, setting up as a defense that the plaintiff released a certain security given by the makers for the payment of the note, and thereby released the defendants as indorsers. The facts proved are as follows: The plaintiff's husband sold his business and chattels therein to the said makers of the note. He agreed to take their note for part of the purchase price, payable in ten months, but exacted that they get indorsers of it, and also give back a chattel mortgage on the said chattels to secure its payment. They made a note payable to the answering defendants, and procuring their indorsement thereof, gave it to the said seller, and at the same time executed and delivered to him the said chattel mortgage, which by its terms was to secure the payment of the said note, and which was ample to pay the said note if foreclosed. Before the said note came due, viz., after it had run 42 days, the said seller transferred it and the said mortgage to the plaintiff, his wife, whereupon she cancelled and surrendered the said mortgage to the makers, and at the same time took from them a new mortgage to her on the said chattels, in terms exactly the same as the first one. When the said note came due, the makers being unable to pay it made a renewal note therefor to the order of the answering defendants, and having procured their indorsement to it as before, gave it to the plaintiff, and took up the

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first note. The said defendants so indorsed the second note without being informed or having any knowledge that the said chattel mortgage had been surrendered up and the new one substituted.

Eugene Frayer, for plaintiff.

J. T. Marean, for defendants.

GAYNOR J.: These answering defendants stood in the relation of sureties to the plaintiff's husband for the payment of the note, and he held the chattel mortgage as security for its payment, not only in his own interest, but also as trustee for them. His duty under such trust was to preserve the said security, and, I suppose, to do whatever was necessary to keep it in life, and a prior lien, (to file it, for instance), and to turn it over to the defendants intact upon their paying the note. It must also be that it was permissible to him under the trust to do anything to strengthen the security, or make it better, such, for instance, as extending it to new or substituted chattels, for those worn out or destroyed, or exchanging it for an adequate mortgage on real property, or for a pledge of government bonds. I do not see how we may avoid this conclusion, having allowed that the relation is one of trust. His own interest required this, and it was equally for the interest of the sureties. He was not permitted to release the security, or diminish it, and to do so would discharge the sureties *pro tanto*. Such a total release in this case would discharge the sureties entirely, for the security was equal to the debt (Hayes v. Ward, 4 Johns. Ch. 123; Vose v. Railroad Co., 50 N. Y. 369; Murray v. Marshall, 94 N. Y. 611). When the said note and mortgage were transferred to the plaintiff by her said husband, whether for value or not, she succeeded to his position in relation to these defendants. She released the said mortgage, but simultaneously took a new one of the same parties, on the same chattels, and of the very same words and tenor, but payable to herself. The security was therefore in no wise diminished or affected, unless some priority slipped in by the change. I doubt if the burden is on the plaintiff to prove that such was not the case. It is not to be presumed that her act was in breach of her trust, or negligent, and detrimental to the sureties; but to the contrary, as is the general rule with trustees. She acted for her own interest, and for that of the sureties, and from the facts proved the security is the very same. It is not to be presumed that there

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were other mortgagees or creditors with liens, and that they got priority. This case does not fall within the principle that where the contract which fixes the surety's liability is changed, he is *ipso facto* discharged, as is the case when the contract time for the principal to pay is extended. There the surety is discharged, because the contract holding him no longer exists and cannot be sued upon, and the new contract is not his contract (Merrill v. Reiners, 14 Misc. Rep. 583). The question here involved depends upon equitable principles. If, as custodian of the security for herself and the sureties, she had violated her trust duty to the sureties, not to release or impair the security, equity would deprive her of her recourse against the sureties, *pro tanto*. It may not be easy to cite authority to that precise effect, but it seems to me that this principle of trust is the one which governs, and upon which the authorities may be harmonized and placed (Brandt on Suretyship, ch. 17; Underhill v. Palmer, 10 Daly, 478).

Judgment for the plaintiff.

FREDERICK KALFUR, an Infant, Plaintiff, *v.* THE BROADWAY FERRY & METROPOLITAN AVENUE R. Co., Defendant.

(Supreme Court, Kings Trial Term, April, 1898.)

Negligence — Verdict for $15,000 in favor of an infant sustained.

A verdict for $15,000 rendered against a street railroad corporation in favor of a boy eighteen months old who, by its negligence, lost his leg below the knee, will not be set aside as excessive.

MOTION to set aside a verdict for the plaintiff as excessive.

C. J. Patterson, for plaintiff.

T. S. Moore, for defendant.

GAYNOR J.: The plaintiff, a boy eighteen months old at the time of the injury, lost his leg below the knee. The verdict was for $15,000. If $2,500 be allowed his counsel, and the remaining $12,500 be invested, and the income thereof be invested and accumulated, until the plaintiff come of age, he would then have a

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sum of about $20,000. This would insure him an income of $800 or $1,000 a year, (which is about as much as we may fairly presume he would earn if whole), and leave the said sum of $20,000 intact at his death. This leaves out of account his earnings; and whether they are to be less for the loss of his foot, depends on the avocation he may select. If he become a lawyer, doctor, clergyman, clerk or merchant, for instance, his earning capacity will not be lessened by the use of an artificial foot. If he is to do certain kinds of manual work, it will be; but the income from the said sum will be as much or more than he could earn in wages if whole. I had an opinion growing out of my own view and discretion, in respect of whether the verdict be excessive. But that is not what must control me. Counsel have furnished me with a list of the cases in which such verdicts have and have not been reduced. Verdicts as large and larger for like injury have been upheld, as a rule, though it is true some have been reduced. Exercising my discretion in the light of precedent, and constrained thereby, I must deny the motion to reduce. Trial judges were never so reluctant to exercise any discretion whatever as they are at present, for reasons that are growing obvious to the bar. They do not have things presented to them under the disguise of print, and with academic after thoughts and refinements, but in their every day reality, just as they are generally seen and understood. Discretion exercised under these different conditions cannot in the nature of things be the same.

Motion denied.

LAURA V. DUNLAP, Plaintiff, *v.* SAMUEL H. GILL et al., Defendants.

(Supreme Court, New York Special Term, April, 1898.)

Absolute devise to a person, but intended to benefit a religious order — Transfer of title to the order by the acts of the parties — Estoppel.

A will devised absolutely to Mary Ely, otherwise called "Mother Jerome," certain lands. It then proceeded, "My purpose in making this devise is to devote the same to the object of a hospital under the charge of the Sisters of Charity, but in expressing this purpose I do not desire to create or attempt to create any trust in law affecting said premises, willing as I am to confide unreservedly in the honor and conscience of said devisee. If said Mary Ely should happen to die before me, then I devise the same as aforesaid to the sister who may

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at the time of my death be at the head of St. Vincent's Hospital, in the city of New York." Mary Ely who was bound, by the rules of her order, to transfer to it all gifts made to her, treated the property as belonging to the order until her death, intestate, about fourteen years later. During thirteen years immediately after the devise of the property, the order paid all the taxes imposed upon it and then procured it to be exempted from taxation as the property of their religious body, and had, when the present action in partition was brought by an heir-at-law of Mary Ely, been in possession of it for about twenty-four years.

Held, that the acts of Mary Ely and those of the members of her order had given to the devise a practical construction as one made to the order, and that she and her heirs under her, were now estopped from questioning the title of the order.

ACTION for partition.

Morris Putnam Stevens, for plaintiff.

Root, Howard, Winthrop & Stimson, for Sisters of Charity of St. Vincent de Paul.

Charles E. Miller, for St. Vincent's Hospital of the City of New York.

Alonzo C. Farnham (James C. Foley, of counsel), for other defendants.

Norman W. Kerngood, for guardian *ad litem.*

DALY, J. The plaintiff, as grandniece and heir-at-law of Mary Ann Ely, known in religion as Mother Jerome, of the Order of Sisters of Charity, commences this action for partition, claiming that Mother Jerome died seized and possessed of certain lots in Fordham, New York, and that the title thereto descended to the plaintiff and other heirs named as defendants. Their claim is resisted by the Sisters of Charity, of which order Mother Jerome was superior at the time of her death in 1885, having been a member of the order since 1827, and a trustee of it from the time of its incorporation in 1849 to the date of her death, and president from January, 1862, to 1871, also from 1877 to 1885.

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The plaintiff asserts title to the lots in Mother Jerome by virtue of a certain devise in a will made by one Margaret Whitworth, on January 6, 1861, as follows:

"I give and devise to Mary Ely, otherwise called Mother Jerome, all the real estate of which I am seized, being certain lots of land situate at Fordham, in the county of Westchester and state of New York, conveyed to me by Stephen Cambreling, to have and to hold the same to her, her heirs and assigns forever. My purpose in making this devise is to devote the same to the object of a hospital under the charge of the Sisters of Charity, but in expressing this purpose I do not desire to create or attempt to create any trust in law affecting said premises, willing as I am to confide unreservedly in the honor and conscience of said devisee. If said Mary Ely should happen to die before me, then I devise the same as aforesaid to the sister who may at the time of my death be at the head of St. Vincent's Hospital, in the City of New York."

The testatrix, Margaret Whitworth, died within a month after making the will.

From the time of the death of Margaret Whitworth, Mother Jerome treated the property so devised to her as the property of the order to which she belonged and as devoted to the object of the hospital under its charge. This is shown by the fact that the sisterhood commenced to pay the taxes on the property in the year 1862, and continued to pay them down to the year 1875, when the lots were procured to be exempted from taxation as the property of the Sisters of Charity, and so remained during the whole period of ten years thereafter down to the time of Mother Jerome's death. The record of the application for such exemption has been lost, but the presumption is that the application was made by the Sisters of Charity, of which Mother Jerome was then a trustee. Under the rules of the order to which she belonged she made an annual vow of poverty, which vow embraced all gifts and donations made to her by way of gratitude, affection or alms as belonging of right to the community. It is testified that in 1870 she made declarations to the sisters concerning the kindness of the lady who had donated this property, and, in 1872, spoke of it to one of the sisters as the property of the hospital.

Apart from the declarations so made, the facts proved show that Mother Jerome construed the devise of the property to her as a devise or gift to the religious order to which she belonged, and that such construction was acquiesced in by the sisterhood, which was

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induced, by the act of the devisee, to pay the taxes and claim the exemption as aforesaid. These facts are conclusive against the claim now made by the plaintiff and the other heirs of Mother Jerome.

We are not concerned with the question whether a trust was actually created by the will of Margaret Whitworth in favor of the hospital or of the order which supported it, but with the consideration that Mother Jerome and the order adopted a practical construction of the will as a devise to that institution, and that the latter was induced not only to disburse the moneys for taxes year by year, but finally to claim exemption from all taxation on the ground that the property belonged to the religious corporation. These facts would, undoubtedly, have estopped Mother Jerome in her lifetime from asserting title as against the religious order to which she belonged; and, by privity with her, her heirs are equally estopped from asserting such title. They affirm the validity of the will and of the devise, which, indeed, they could not attack, not being heirs of the testatrix; and whatever construction of the devise was adopted by the devisee and which precluded her from asserting individual title, must be equally binding upon them. They claim that she had the absolute right to dispose of the property as she pleased, and so she was at liberty to work an estoppel against herself and equally against them.

Nothing can be more complete than the estoppel in this case. Mother Jerome, the owner of the fee, being a trustee of a religious body, permitted its charitable funds to be used to pay the taxes on the property which stood in her name, and ultimately permitted a claim of title of such corporation to be used to procure the exemption of the property from its legal charges. To permit her to question such title after such acts would but assist her in perpetrating a fraud; and it is not only the state which would be defrauded by permitting such claim, but the religious body to which she belonged and which had been induced to assert ownership in good faith to procure the exemption, and which would be laid open to a charge of participation in the fraud of the devisee if its title could now be disputed by her or her heirs.

The acts of Mother Jerome are found to be consistent throughout with her obligations, first, to her religious vows, which imperatively required her to treat this property as a donation or alms to the order; second, to her legal obligations as trustee of the religious cor-

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poration for which she had the right to assume that the property was intended; and, third, to her construction of the will of Margaret Whitworth as a devise in aid of a charity in which the sisters were engaged. This construction would, undoubtedly, commend itself to a devisee who had then been in the religious community for twenty-five years, and who would read the will as intending that the property donated should go, not to her individually, but to the charity. This would be apparent, not only from the wish expressed to devote the property to the object of a hospital under the charge of the sisters, but by the provision that if the particular devisee should die before the testatrix the property should go to the sister who at the death of the latter should be at the head of St. Vincent's Hospital.

Although not in form creating a trust, the will was so construed for over twenty-four years by the devisee, and practical effect was given to it by her and the assumed beneficiaries thereunder, who were induced thereby to alter their position irrevocably. There can be no question as to this fact of practical construction. We must concede it, or else convict the devisee, Mother Jerome, of intending a scheme for depleting the treasury of her order, and for defrauding the state; and all for the benefit of distant collateral relatives. She died intestate, an indication that she believed she had disposed of the property according to her understanding of the wishes of the donor, and that she had no personal interest in it to devise.

That the owners of real estate may by their acts estop themselves from asserting claim or title to such property in themselves and from denying it in another is a principle too firmly established to be questioned (Favill v. Roberts, 50 N. Y. 222; 7 Am. & Eng. Enc. of L. 18, etc., and notes and cases cited), and the decision in this case should be that the plaintiff and the other defendants, as heirs of Mother Jerome, have no claim or title to the lots in question, after the construction placed by her for so long a period of time upon the devise in her favor, and also on the ground that her heirs are estopped by her act from asserting title against the Sisters of Charity or St. Vincent's Hospital.

Judgment for defendants, the Sisters of Charity of St. Vincent de Paul and St. Vincent's Hospital of the City of New York.

Judgment accordingly.

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THE EAST RIVER SAVINGS INSTITUTION, Plaintiff, *v.* CLARENCE T. BARRETT, as Trustee, etc., Defendant.

(Supreme Court, New York Trial Term, April, 1898.)

Action by a bank to recover a deposit paid — Knowledge of "facts constituting the fraud" — Code Civil Procedure, § 382, subd. 5.

In an action brought by a bank to recover of the executor and trustee of S. Barrett a deposit paid, it appeared that after her grandson, Nathan B. Mundy, had become insane the plaintiff, without authority from him, changed his bank book to "in trust for S. Barrett," that it, without authority from him and with knowledge of his insanity, again changed it to the name of "S. Barrett," and in 1880 paid to her his deposit. She died in 1883. In 1895 Mundy recovered the deposit of the bank. The complaint in the present action did not allege that S. Barrett was guilty of any actual fraud in the matter, and it appeared, on the contrary, that she had fully believed herself to be entitled to the deposit, in the interests of the incompetent. An accounting was demanded.

Held, that the action, whether deemed legal or equitable, was, in effect, one to recover a sum of money merely on the ground of fraud, and that as all the "facts constituting the fraud" were known to the plaintiff when it paid the deposit to S. Barrett in 1880, the action, not brought within six years of that time, was barred by subdivision 5 of section 382 of the Code of Civil Procedure.

THE facts appear sufficiently in the following opinion.

Charles N. Judson, for plaintiff.

Sidney F. Rawson, for defendant.

BARNARD, J. Nathan B. Mundy, on the 1st of February, 1879, deposited $1,000 with the plaintiff, and took a bank-book showing the deposit in his own name. On the 19th of February, 1877, this bank-book was changed by the bank so as to make the deposit read: "Nathan B. Mundy, in trust for S. Barrett, February 19, 1877." No authority is shown for this change upon the part of the original depositor. On the 5th of December, 1879, the book was again changed by the bank, so as to make the deposit stand on the book in

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the name of S. Barrett. This last change was made by the bank when Mundy was in the lunatic asylum, and incapacitated thereby from acting understandingly. Mrs. Barrett was Mundy's grandmother, and this last change was made on her application. She was the widow of Nathan Barrett. She claimed to own this deposit. She wrote to the bank that she wished the account put to her individual credit. That her grandson was insane, and this letter was accompanied by an affidavit on the part of her husband's executor that her statement was true.

On the 27th of April, 1880, Mrs. Barrett drew out the balance then unpaid, having before that date and in 1880 drawn out portions thereof on three separate occasions.

The payments were all made on her individual draft..

Mrs. Barrett died in 1883. In November, 1894, Nathan B. Mundy brought an action against the bank for the original deposit and interest, and in September, 1895, obtained a verdict from a jury that this money was his own. By Mrs. Barrett's will, Nathan B. Mundy is entitled to a life use of the residue of her estate with remainder over after his death to other parties. The defendant is the trustee for this fund. The justice of the plaintiff's claim is undeniable. Mrs. Barrett secured a deposit which she did not own and had no right to receive under the evidence. No intentional misstatement was made by her. She was a lady of the highest character. She made her claim in good faith, but it was not well founded. She gave strong evidence tending to support her right to this money, but I feel bound on this question to find with the jury. The sole question remaining is presented by section 382 of the Code, subdivision 5, which reads as follows: "Within six years." An action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, eighteen hundred and forty-six, was cognizable by the Court of Chancery. The cause of action, in such a case, is not deemed to have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts constituting the fraud." This section covers all cases where the Court of Chancery on that day had cognizance solely, and all cases where the jurisdiction was concurrent with the lower court. Bosley v. National Machine Co., 123 N. Y. 550. It applies where a sum of money is demanded incidentally to the decree in equity. Carr v. Thompson, 87 N. Y. 160. What action did the bank have on the 27th of April, 1880, when the last of the money had been drawn out by

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Mrs. Barrett, on the facts as they now appear. The bank had two forms of action. 1. Contract. A payment made to Mrs. Barrett under a claim of title not good, whether made intentionally or by mistake, would support an action by the bank against her. The law would imply a promise to repay. 2. The bank would have an action for fraud. The complaint would then aver that the payment was procured by an intentional falsehood, or by a statement not known to be true. This action, whether called legal or equitable, would be one for a sum of money merely on the ground of fraud, and as such would not be relieved from the six years' limitation in this subdivision 5 of section 382. Miller v. Wood, 116 N. Y. 351. The demand for an accounting in the complaint does not furnish the requirement of an equitable claim which would make the claim other than one for the recovery of money only. This action must be judged by what it might have been in April, 1880. There was no right to an accounting then against Mrs. Barrett, and it is not within the theory of the subdivision that an accounting after the death of the wrongdoer would give an additional right, which would not exist when the cause of action arose. My conclusion therefore is that the action is barred by the Statute of Limitations. Was there anything fraudulent to discover? There was no intent to cheat or defraud, but Mrs. Barrett got money she did not own, and she ought not to keep it; but the defendant is an executor and trustee, and he must plead the statute or become personally liable for the loss of the estate, so far as it is lost by his omission. Butler v. Johnson, 111 N. Y. 204. The bank knew every fact but one. The deposit was received from Mundy as his own. The bank without authority changed the book so as to make Mrs. Barrett beneficiary, and Mundy trustee for her. The bank, without authority from Mundy, and with full knowledge that he was at the time insane, again changed the deposit-book so that it gave the title of the fund to Mrs. Barrett absolutely, and this was finally followed by the payment of the money to her as her individual property. The bank knew everything then that appears now, except that the validity of the claim of the title was a thing of the future, in 1880. The bank should have known what it might have known on reasonable inquiry. The bank had notice that the first change was wholly at war with the deposit, and with the final claim. After Mrs. Barrett obtained that change, the bank should have asked why the conditions were changed so as to make her absolute owner.

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The bank knew, in December, 1879, that it was paying away the property of a lunatic solely upon the representation made by his grandmother, and that she was the owner. And the bank knew that, as against the original depositor, the change was of no use, and that its justification would finally depend on the real fact as to the title. When the title was found to be in Mundy, the bank was without defense under the changed books and under Mrs. Barrett's claim of title.

I, therefore, find that the bank knew of the facts, constituting the fraud, in 1880, when the money was paid. Higgins v. Crouse, 147 N. Y. 411. I believe the real facts would justify every one. Mr. Mundy became erratic, and finally insane. His grandmother loved him. He was her heir and next of kin. His grandmother believed this deposit was her own. The demented child must be cared for. He was cared for and he should, under the circumstances, have let the deposit go. He gets now the use of the sum of money from his grandmother's estate. He has obtained from the bank the deposit which, if not applied to his use, forms part of the estate he uses. The result is not one which should be deemed satisfactory to the grandson. Judgment for defendants, with costs.

Judgment for defendants, with costs.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* DAVID LINDENBORN, Defendant.*

(Supreme Court, New York Criminal Term, November, 1897.)

1. **Grand jury — Evidence of other crimes.**

It is unlawful for a grand jury, while passing upon a charge that the defendant, in violation of section 443 of the Penal Code, sold goods to himself at public auction under a fictitious name, to consider proof offered that he was in the habit of striking off goods to the name Lohring, a fictitious name which represented himself.

2. **Same — Proof under Penal Code, § 443.**

With this testimony excluded, evidence of a former employee, that "on one occasion a set of plates was knocked down to Lohring," and that the witness took one of them to and left it at the house of the accused, is insufficient to justify the finding of an indictment.

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* Received too late for insertion in proper place.—[Rep.

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3. Same — Time within which an indictment must be found.

In view of the provisions of the Code of Criminal Procedure (sections 142, 143), that an indictment for a misdemeanor "must" be found within two years after its commission, except that the time during which the accused was not an inhabitant of, or usually resident in, or usually in personal attendance upon business within, the state of New York, no indictment for a misdemeanor can be found unless proof is made before the grand jury that the offense was committed within the statutory period or that the statutory exceptions exist.

4. Crimes — Statute of Limitations — Waiver.

Where a statute has run against a crime, nothing can revive the crime, except a plea of guilty.

MOTION to dismiss indictment on the ground that the evidence presented to the grand jury was insufficient.

Blumenstiel & Hirsch (F. L. Wellman, of counsel), for defendant.

Vernon M. Davis, for People.

FURSMAN, J. The defendant is charged by indictment with having violated section 443 of the Penal Code, relating to mock auctions. A motion is now made on his behalf to dismiss the indictment on the ground that the evidence presented to the grand jury was insufficient to authorize it.

The motion must be granted.

There was illegal evidence received by the grand jury of such a character that it may well have influenced that body toward finding an indictment upon the specific charge made. The charge being that the defendant unlawfully sold at public auction a china plate in violation of section 443 of the Penal Code by selling the same to himself under a fictitious name, evidence was received by the grand jury, and presumably considered by it, to the effect that he was in the habit of committing this offense by striking off goods to the name Lohring, that being a fictitious name representing himself. This evidence was clearly improper. No one should be indicted because accustomed to commit crime, nor should evidence of such fact be permitted to influence the mind upon a question whether a particular crime has been committed. Only legal evidence can

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properly be received by the grand jury. Code of Criminal Procedure, § 256. It is, perhaps, true that an indictment may properly be found when there is sufficient legal evidence to authorize it, notwithstanding improper evidence has also been received, but in this case it is apparent, I think, that the grand jury must have given weight to the improper evidence presented and acted upon it in the final determination reached.

There was not sufficient legal evidence to authorize the finding of this indictment. The only legal evidence before the grand jury was that of one O'Gorman, who testified that he was formerly an employee of the defendant, that "on one occasion a set of plates was knocked down to Lohring," and that he (the witness) afterwards took one of these plates to the defendant's house and left it there. Eliminating the illegal evidence above referred to, there is nothing whatever showing, or tending to show, that Lohring was a fictitious person, or that that name represented the defendant, nor that the plates were sold by the defendant to himself under that name. That one of these plates was afterwards taken to defendant's house and left there is a fact as consistent with innocence as guilt. It did not even appear that this was done at his instance. It may well be, so far as any legal evidence before the grand jury is concerned, that the plates were struck off to a real bidder who afterwards presented the defendant with one, or sent it to his house, without his knowledge. The presumption of innocence prevails as much in the grand jury room as elsewhere, and the evidence before that body must be such as to clearly overcome that presumption before an indictment can properly be found. It is, therefore, clear to my mind that the grand jury must have given effect to the illegal evidence received, inasmuch as without it there is no evidence that Lohring and defendant were one and the same person, nor that the defendant struck off the plates to himself. The legal evidence received does not indicate a crime. It is only by supplementing it with the improper and illegal evidence that it is made to appear that a crime has been committed.

There is, in my opinion, another reason for granting this motion. There was no evidence before the grand jury of the time of the commission of the crime charged. Section 142 of the Code of Criminal Procedure declares that "An indictment for a misdemeanor must be found within two years after its commission." The only exception to this requirement is found in section 143, which provides that no time during which the accused is not an inhabitant

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of, or usually resident within the state, or usually in personal attendance upon business within the state, is to be deemed a part of the limitation. A grand jury is not authorized to find an indictment for a misdemeanor after the lapse of two years from the time of its commission, unless it is made to appear by the evidence before it that some one of the exceptions stated in section 143 exists.

The first inquiry must be, was the crime committed within two years? If it was not there is but one remaining inquiry, was the defendant during any portion of that time not an inhabitant of or usually resident within the state, or usually in personal attendance upon business within the state? If the crime was committed more than two years before the case is presented to the grand jury and nothing appears to take it out of the operation of the statute, I do not think an indictment can properly be found. A person cannot properly be indicted for an offense of which the law cannot take cognizance, and under section 142 the law cannot take notice of an offense committed before the time limited by that section, unless the case is within some one of the exceptions specified in section 143. The statute is peremptory. The indictment "*must*" be found within the time limited, unless the case falls within the exceptions stated. The grand jury may not find an indictment simply because a crime has been sometime committed, but only when it has been committed within the prescribed time, unless it appears by the evidence before it that although committed before the prescribed time the statute has not run against it. This necessitates proof either that the crime was committed within the time limited, or that some fact exists by reason of which the operation of the statute had been suspended. If it appears to have been committed beyond the limited time it is, in judgment of law, as if no crime has been committed, and the grand jury is bound to so regard it, unless it also appears that because of some one of the exceptions stated in section 143, it is not barred. To constitute a crime at all of which the law can take notice it must have been committed within the statutory time, or the exception must exist, and unless there is proof of one or the other of these facts the grand jury cannot legally act. In People v. Lord, 12 Hun, 282-287, it is said that "A statute limiting the time within which indictments must be found is a surrender by the state of its right to try and punish criminal offenses at its discretion, without limit as to time." The People v. O'Donnell, 15 N. Y. St. Repr. 141, a demurrer had been interposed to an indictment charging a misdemeanor. The

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demurrer was sustained on appeal to the General Term of the fourth department, the court declaring that because more than two years had elapsed since the commission of the offense charged the defendant could not be reindicted, and must, therefore, be discharged. The cases of United States v. Cook, 17 Wall. 168, and People v. Durrin, 2 N. Y. Crim. Rep. 328, turned upon a question of pleading, and simply hold that a Statute of Limitations cannot be taken advantage of by demurrer. That is quite different from saying that a grand jury may declare by its indictment that a punishable crime has been committed without evidence that the crime alleged is one that can be punished according to existing law, at the time the indictment is found. Considered as a pleading the indictment need not state the precise time of the commission of the offense. It is sufficient if it is charged to have been committed prior to the indictment (Code of Criminal Procedure, §§ 280-284), and if it appears upon the face of the indictment that it was committed more than the limited time before indictment found it is not for that reason bad, because the facts which take the case out of the operation of the statute may be proved on the trial without pleading them. But a grand jury has to determine from the evidence before it whether a crime for which the person charged can be punished has been committed, and this cannot be done unless there is evidence either that the crime was committed within the time limited for finding an indictment or evidence bringing the case within the exceptions specified in section 143. I cannot subscribe to the proposition that pleadings in respect to the Statute of Limitations are the same in criminal as in civil actions, or that the same rules apply. Though the Statute of Limitations has run against a debt it is not thereby extinguished. It may be revived by a payment upon it, by a written promise to pay it, etc., nor can the statute be made available unless it is affirmatively pleaded. If not pleaded it is deemed to be waived. But when once the statute has run against the finding of an indictment for crime the crime is extinguished. It cannot be revived, nor waived. Nothing can be waived in a criminal action except by a plea of guilty. In People v. Lord, 12 Hun, *supra*, the court say: "The two classes of statutes, however, are essentially different. In civil suits the statute is interposed by the legislature as an impartial arbiter between two contending parties. * * * But it is otherwise when a statute of limitation is granted by the state. Here the state is the grantor surrendering, by act of grace, its right to prosecute, and ordering

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the offense to be no longer the subject of prosecution." I am persuaded that there must be some evidence before the grand jury showing that the right to prosecute exists before an indictment can properly be found. It must be shown that the Statute of Limitations has not run against the crime, either by proof that it was committed within the statutory time, or that the case is within the statutory exceptions. An alleged offender, when the Statute of Limitations has run against the offense charged, may confidently cease to preserve the proofs of his innocence, "for the proofs of his guilt are blotted out."

HENRY DOYLE, as Administrator, Etc., Plaintiff, *v.* WILLARD R. KIMBALL, Defendant.

(Supreme Court, Onondaga Special Term, April, 1898.)

1. **Order to examine defendant to frame compaint — When refused.**

   An order, requiring a defendant to submit to an examination so that the plaintiff may frame his complaint, should not be allowed to stand where the moving affidavit, is, without explanation, made by the attorney instead of by the plaintiff himself, where the order requires the defendant to produce books which are not shown to be in his possession nor under his control and where the plaintiff does not show that he has a cause of action.

2. **Creditor's action under Stock Corporation Law, § 54, against a stockholder for an improper issue of stock — Proof that the issue was outstanding when the liability was incurred.**

   As, under section 54 of the Stock Corporation Law (Laws of 1892, chap. 688), a stockholder of a stock corporation is liable for a debt only "until the whole amount of its capital stock issued and outstanding at the time such debt was incurred shall have been fully paid," the plaintiff must show, in an action predicated upon an alleged improper issue of stock to the defendant and others, that the issue was outstanding when the plaintiff's claim was incurred, whether such date is to be regarded as the time when the alleged negligent act was committed, or as the time when the claim was put in judgment against the corporation by the creditor.

3. **Same — Semble, that a stockholder is liable for contract debts of the corporation but not for its negligent acts.**

   ***Semble,* that sections 54 and 55 of the Stock Corporation Law do not permit the creditor to hold a stockholder for a corporate liability**

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which sounds in tort and that the statute applies only to ordinary debts, voluntarily contracted by the corporation and becoming due at some given time.

MOTION to set aside an order heretofore granted, requiring said defendant to submit to examination before trial, and also upon said examination to produce certain books of the Syracuse Street Railroad Company.

Charles E. Spencer, for motion.

Thomas Hogan, opposed.

HISCOCK, J. The object of the examination under said order was as claimed to secure information to enable plaintiff to frame his complaint. The nature of the action as outlined by the affidavit upon which the order was granted is to hold defendant liable as a stockholder in the Syracuse Street Railroad Company, under sections 54 and 55, Stock Corporation Law, for a claim against said company. Said claim is now represented by a judgment recovered against said company upon which an execution has been issued and returned unsatisfied, and although it does not appear by the affidavit it was agreed upon the argument that said claim was for damages resulting from the negligence of the railroad company. The specific ground of the alleged liability of defendant is that while he was an officer and stockholder of said company a large amount of stock was issued by it to him and other persons which was not paid for either in cash or property.

There are several reasons why the order in question should be set aside.

1. It requires the defendant to produce a large number of books which do not appear to be in his possession or under his control.

2. The best authority is that the affidavit upon which the order was granted should have been made by the plaintiff rather than the attorney, as was done, in the absence of some sufficient explanation. This rule is not entirely technical, that where one party is seeking the preliminary examination of another upon the ground that certain information is necessary to and not possessed by him that he should guarantee such necessity by his own affidavit. It might very often happen that the attorney could perfectly well make the required affidavit when the party could not. Simmons v. Hazard, 58 Hun, 119.

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3. It is well settled that to secure a preliminary examination such as is here sought, it must be apparent from the papers upon which the order is founded that the plaintiff has a cause of action against the defendant.

Under section 54, a stockholder is only liable for a debt until the amount of the capital stock of the corporation *issued and outstanding at the time such debt was incurred,* shall have been fully paid. There is nothing to show that the issue of stock complained of by plaintiff and upon which he seeks to predicate the liability of defendant was outstanding at the time plaintiff's claim was incurred, whether such date is to be regarded as the time when the negligent act was committed or as the time when the claim was put in judgment. So far as appears this issue of stock may not have taken place until after both events. There is absolutely nothing to show when it occurred. This fact and element, therefore, essential to plaintiff's recovery does not appear to exist.

In addition to the foregoing grounds and independent of the alleged general insufficiency of the affidavit, a grave question exists whether plaintiff can hold defendant liable upon a claim against the corporation, in which he was a stockholder, for negligence. There is no lack of authorities both in the courts of this state and elsewhere, holding that a trustee would not be personally liable under the provisions of the statutes for failure to file an annual report, upon such a liability. It is urged, however, that such provisions of the statutes making a trustee personally liable upon a failure to file a report are penal and strictly to be construed and that in this respect they are different from the provisions making a stockholder personally liable where stock has been issued and not paid in; that these latter provisions should be construed more liberally in favor of the creditor. There is some force in this argument, but of course the liability of the stockholder is dependent upon the statute, and the question is whether the reasonable construction of the language used permits a conclusion such as is urged by plaintiff. The language of section 54 is: "The stockholders of every stock corporation shall * * * be personally liable to its creditors," etc. The term "creditor" is broad enough to amply sustain the claim made. Further on, its meaning is somewhat narrowed by the use of the words "at the time said debt was incurred," and under section 55, relating to the same subject, we find the language: "No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it was contracted, nor unless an

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action for its collection shall be brought * * * within two years after the debt becomes due." The natural import of all of this language taken together would seem to be that the claims contemplated were ordinary debts voluntarily contracted by the corporation and becoming due at some given time, rather than an involuntary obligation imposed upon the corporation by some negligent or tortious act.

This construction is sustained in the case of an attempt to make a stockholder personally liable for a negligent act of the corporation under a former statute of which the wording is substantially similar upon the point in question to the one now in force. Heacock v. Sherman, 14 Wend. 59.

This case thus far has not been overruled and the same rule maintained by it is laid down by various text writers. Cook on Stockholders (3d ed.), § 217.

The order is vacated, with $10 costs.

Matter of Proving the Last Will and Testament of ALONZO G. CORNELIUS, Deceased.

(Surrogate's Court, Ulster County, April, 1898.)

1. **Testamentary capacity — Lucid interval of one suffering from the insanity of consumption.**

   Although a testator may be suffering from the insanity of consumption, a progressive disease, a will, made by him during a lucid interval and which seems to be the work of a rational man who understood his position, the membership of his family and the extent of his property, will be sustained.

2. **Corporations — Power to take under Laws of 1848, chap. 319.**

   Where there is no proof that certain corporations, benefited by a will, were incorporated under chapter 319 of the Laws of 1848, the objection, that the bequests to them were, in violation of that statute, made within two months before the death of the testator, is not available.

PROCEEDINGS upon probate of a will.

George G. Keeler (John J. Linson, of counsel), for petitioner, also for legatees.

Adam Frank (William D. Brinnier, of counsel), special guardian of Franklyn G. Cornelius and Egbert I. Cornelius.

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BETTS, S. Alonzo G. Cornelius died in this county on the 3d day of March, 1897, having previously made a paper writing bearing date, January 7, 1897, which is offered here for probate as his last will and testament. He left three children, Carrie Herbert, a daughter, Egbert I. and Franklyn H. Cornelius, sons, the latter of whom is a minor; Egbert I. arriving at the age of twenty-one, during the pendency of this contest.

On behalf of Ebgert I. Cornelius, objections were filed to the probate of this will, and subsequently Mr. Frank, as special guardian, joined in those objections. The testimony has been directed towards showing that the deceased at the time the will was executed was mentally incompetent to make a will. There has been no proof as to undue influence.

The deceased resided at Ellenville, and up to a short time before his death he had conducted a grocery store there. He was afflicted with consumption. He had been to Spring Glen, a short distance from Ellenville, twice in the fall and early winter of 1896, for relief. He returned to Ellenville the last time during the latter part of December, 1896. Shortly thereafter, he sent for James B. Keeler, a reputable lawyer at Ellenville, who had been his attorney for some time, and asked him to draw a new will for him. Mr. Keeler a few months before had prepared a will which deceased executed. With this will as a guide, Mr. Cornelius directed Mr. Keeler as to the way in which he desired his will drawn. Some legacies in that will were omitted, and in others, the amounts were changed. The changes were few. Mr. Keeler prepared the will in accordance with the directions of Mr. Cornelius at his own office, and took the paper to Mr. Cornelius. Mr. Keeler read this paper aloud, and Mr. Cornelius read it himself, saying the will was right. Daniel E. Hornbeck, a neighbor of Mr. Cornelius, was sent for at Mr. Cornelius' suggestion as a witness. The will was then executed according to the formalities of the statute.

Mr. Cornelius continued to grow worse, and on the 3d of March, he died. His disease was defined to be tubercular meningitis, or inflammation of the covering of the brain. His attending physician, Dr. Eastgate, testified that in his opinion the decedent had the insanity of consumption and was irrational. He testified that insanity of consumption is a disease that affects the brain, destroying the integrity of the mind, and is progressive. He could not be positive when this commenced, but thought it was some time in December, 1896. He said that at times the mind of the deceased

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would appear clear, and that in October, 1896, he first noticed his being a little queer. Two expert physicians were called and they testified from a hypothetical question that they considered that Mr. Cornelius had sufficient mental capacity on January 7, 1897, to make a will. It was undeniably established that at times during his last illness, the deceased was the subject of delirium, which increased as he neared his end. The testimony, substantially, of all the witnesses, was that he had long lucid intervals between these attacks. The question then for decision is: Was he rational, and did he have a lucid interval at the time of making the will offered for probate? Both subscribing witnesses say he was rational on that day, and there is no testimony that he was not. These witnesses knew him well, Mr. Hornbeck being a near neighbor of his, also a merchant and acquainted with Mr. Cornelius for many years. The deceased wrote something on a paper a day or so before the date of the will, which is certainly unintelligible and at different times shortly before and shortly afterwards, and from that time until his death, he did numerous strange things which would indicate that he was at such times suffering from delirum as a result of the disease which was slowly exhausting him. Many witnesses were produced, some of whom thought him rational and some not. However, he did some business, shortly before making his will, with different parties. After making the will he gave a deed of real estate, upon which his residence and grocery were situated, to the members of his family now contesting his will, and took back a bond and mortgage from them for a part of the purchase money for such conveyance. He also subsequently sold another piece of real estate and gave a deed therefor. Subsequent to the date of the will he also gave a mortgage to secure an accommodation indorser for his note. No question as to his rationality at these times, or as to his ability to do these acts was raised, so far as is shown either by those with whom he dealt, or by his children now contesting.

It was held by the Court of Appeals in a somewhat similar case (Van Guysling v. Van Kuren, 35 N. Y. 70), that "The testator should be capable of comprehending the condition of his property, and his relations to the persons who are or might have been the objects of his bounty. He should be able to collect in his mind, without prompting, the elements of his business to be transacted, and hold them there until their relations to each other can be perceived, and a rational judgment in respect thereto be formed."

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In the Matter of Davis, 71 N. Y. St. Repr. 181, the testator was upwards of seventy years of age, and had been sick with heart disease for about a month prior to the execution of his will. A good part of the time he was unable to lie down or take sufficient nourishment and at times he was flighty and light-headed. That will was executed December 7. One witness testified that the testator was irrational the day after its execution; another witness saw him three times between the 8th and 23d of December, when he died, and at each of such times he was irrational. Another witness saw him after December 13th and he was irrational. The lawyer who drew the will testified that he called on him on the afternoon of December 7th, that he was then irrational and he would not allow him to execute the will. The court held: "The irrational conversations which were testified to by the contestants' witnesses did not prove that the testator was insane. They were manifestations of the progress of the disease from which he suffered, and indicated a weak mind, as the result of suffering from lack of rest and proper nourishment. These periods of irrational action and lack of sound mental control were temporary, and when they had passed the testator was able to attend to business." The surrogate admitted the will to probate, and the General Term affirmed the surrogate's decree.

In Cheney v. Price, 72 N. Y. St. Repr. 568, the will was executed February 1st, and the testator died April 20th. The surrogate admitted the will to probate over the objections of certain of the heirs-at-law. Later, action was brought in the Supreme Court to determine whether that writing was or was not the last will of the testator. It appeared that the deceased was about sixty-eight years of age and, a short time before the 15th day of December, had a fit of apoplexy which finally resulted in partial paralysis. The court says: "Nearly all the witnesses, including the doctor in attendance during his sickness, advanced the opinion, based upon the circumstances attending interviews had with the deceased, and his manifestations, that his conduct, acts and sayings impressed them as irrational. The doctor in attendance advanced the general opinion, from observance made at various times during his attendance upon the testator, that he was a person of unsound mind, and was incompetent to transact any business requiring consideration and judgment. Upon the established existence of the facts narrated, the plaintiff contends that the paper writing produced is not the will of the deceased, for the reason that at the time he executed it he was not of sound and disposing mind and memory. The

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material inquiry is not the mental condition of the deceased on any of the days succeeding his affliction, except for the purpose of determining what his condition was on the 1st day of February, 1892, when he executed the instrument produced as his last will and testament; so that if the evidence fairly discloses that, notwithstanding he had undergone this marked mental and physical change, as described by the witnesses, at the time of the execution of the paper writing, the deceased had sufficient force and integrity of mind to deliberate upon the subject of the disposition of his property, having regard to its nature and amount, the relatives who might or should be the objects of his bounty, and form a rational judgment thereon without prompting, then the question directed by the statute to be inquired into should be answered in the affirmative. It is not essential to the validity of his act that he be possessed of the vigor and resolution of mind and body that he possessed in prime of life, but simply that he had sufficient memory and judgment upon the occasion of making the instrument to make it his deliberate and intelligent act."

The will was sustained by the Supreme Court, and the judgment was affirmed by the General Term of that court.

The papers filed here show that the value of the estate left by the deceased, Mr. Cornelius, was about the sum of $4,000. With the exception of a few small legacies, his entire property is left to his three children.

The will, itself, seems to afford some evidence of being the work of a rational man, understanding his position, the members of his family and the extent of his property.

In addition to the mental incapacity of the deceased to make a will, objections were also made to certain small bequests as follows:

To the Wawarsing Soldiers Monument Association ..	$50 00
To the Methodist Episcopal Church of Ellenville...	25 00
To the Reformed Church of Ellenville	15 00
To the Lutheran Church of Ellenville	10 00
To the trustees of the Ellenville Public Library....	15 00
To the Women's Christian Temperance Union of Ellenville	20 00

These objections were made for the reason that these bequests were made within two months before the death of the decedent.

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These objections were taken under chapter 319, section 6, of the Laws of 1848. That section provides:

"Any corporation formed under this act, shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of ten thousand dollars; provided, no person leaving a wife or child or parent, shall devise or bequeath to such institution or corporation more than one-fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth, and no such devise or bequest shall be valid, in any will which shall not have been made and executed at least two months before the death of the testator."

There is no evidence before me to show that any of these corporations were formed under this statute. So far at least as the probate is concerned this contention is not sustained.

After a painstaking examination of nearly 300 pages of testimony taken in this case, I am convinced that on January 7, 1897, at the time this will was executed, the deceased was of sound and disposing mind, and was not under any restraint; and a decree may be handed up, admitting his will to probate.

Decreed accordingly.

Matter of the Estate of EMMA E. WOLFE, Deceased.

(Surrogate's Court, Westchester County, April, 1898.)

Transfer tax of 1892 — Devise to a foreign corporation, authorized to take and hold property in the state of New York.

A foreign corporation, although enabled by chapter 557 of the Laws of 1893 to take by devise and hold property in the state of New York, within existing statutory limitations, is, in the absence of any statutory exemption, taxable under chapter 399 of the Laws of 1892, upon the succession to a legacy under the will of a decedent who died in January, 1894.

APPEAL from a decree assessing transfer tax.

Joseph W. Middlebrook, for state comptroller, appellant.

E. S. Clinch, for American Baptist Publication Society, respondent.

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SILKMAN, S. This is an appeal from a decree assessing the transfer tax upon the succession to the estate of Emma E. Wolfe. The decedent died January 8, 1894, and the succession is taxable under chapter 399 of the Laws of 1892. The ground of the appeal is that the decree fails to assess a tax against the legacy to which the respondent succeeds. I think the appeal must prevail. I am unable to distinguish this case from that of Matter of Prime, 136 N. Y. 349, in which the court said in referring to a foreign corporation: "It is obvious that the corporations now claiming exemption from the legacy tax must be able to point to some statute of this state antedating the assessment of the legacy duty which exempts foreign religious and charitable corporations from taxation generally, or specially from taxation under the Inheritance Tax Law."

The Law of 1892 provides for a tax upon the transfer "to all persons or corporations not exempt by law from taxation on real or personal property in the following cases."

The Laws of 1890, chapter 553, exempts certain corporations therein referred to from taxation under the Inheritance Tax Law of 1885, and the acts amendatory thereof.

It has been held that the exemption of the corporations in said act referred to are domestic corporations only. The respondent claims, that by reason of an enabling act chapter 557 of Laws of 1893 authorizing them as follows: "shall have power to receive, take, hold and enjoy any property, real or personal, in the state of New York, by virtue of any devise, bequest, gift, grant, or purchase, subject, in respect to the amount of property it may take and hold, to the restrictions and limitations of existing laws, and in respect of devises and bequests from residents of the state of New York, to the provisions of chapter 360 of the Laws of 1860," it is not subject to taxation. The right to take, hold and enjoy property does not relieve the respondent from taxation any more than an act of the legislature authorizing an alien to take by grant or devise, would exempt such alien from taxation under the Transfer Tax Law. That the right to tax and hold is made subject to limitations of existing laws and subject to limitations of chapter 360 of the Laws of 1860, cannot be construed to relieve the respondent from the operation of the revenue laws of the state.

The decree must be modified adjudging a tax upon the succession of the respondent. Twenty-five dollars costs of appeal awarded to appellant against the respondent.

Decree modified, with $25 costs to appellant.

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S. OLIN HARDY, Respondent, *v.* CLIFFORD F. EAGLE, Appellant.

(City Court of New York, General Term, April, 1898.)

Husband and wife — Abandonment — Necessaries.

Where a husband abandons his wife and minor children and fails to support them, she has a right to bind his credit for all necessaries supplied for her and their use.

APPEAL from a judgment in favor of plaintiff entered upon a verdict.

Albert W. Seaman, for appellant.

Willis B. Dowd, for respondent.

FITZSIMONS, Ch. J. The plaintiff a physician, rendered professional services to defendant's wife and minor son; at the time of the rendition of such services defendant and his wife were living apart; upon the trial it was claimed by defendant that his wife had deserted him and compelled him to leave her home. The testimony of defendant's wife showed that defendant had abandoned her, leaving her no means for support and that he failed to supply the necessaries of life; certainly it was the duty of defendant to furnish his wife and minor children with all necessary food, clothing, medical services, home and other essentials of life.

This duty continued until death, or the law absolved him. The law would free him from the performance of this obligation in case his wife, without sufficient cause left him.

If he left her she had a right to bind his credit for all necessaries supplied her for her own use and the use of their minor children. Therefore, in this action if plaintiff succeeded in establishing the fact that the defendant had abandoned his wife and failed to furnish her with necessaries which as before stated included doctor's services he had a right to recover from defendant the value of such services.

Upon the question of the abandonment of his wife by the defendant there was considerable conflict of testimony, but we think that the jury were justified in finding that the defendant was at fault, that he, and not his wife, was the wrongdoer, and that he had abandoned her and failed to provide her with any means.

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Having so found, of course, plaintiff was entitled to the value of the services rendered defendant's wife and minor son.

Finding no error, the judgment must be affirmed, with costs.

O'DWYER, J., concurs.

Judgment affirmed, with costs.

ALICE STOKES, Respondent, *v.* ALBERT BEHRENES, Appellant.

(City Court of New York, General Term, April, 1898.)

Election of remedies, as between false imprisonment and malicious prosecution.

Where a complaint contains all the allegations necessary to sustain an action for false imprisonment as well as one for malicious prosecution, the defendant may compel the plaintiff to elect upon which cause of action he intends to rely.

APPEAL from an order denying a motion requiring plaintiff to state separately the two causes of action set forth in the complaint and to elect which of them he will rely upon in this case.

Herbert J. Hindes, for appellant.

Charles I. Schampain, for respondent.

CONLAN, J. This is an appeal from an order denying a motion made on behalf of the defendant, requiring the plaintiff to state the two causes of action set forth in the complaint separately and to elect which of the two causes of action set forth in the complaint,— false imprisonment or malicious prosecution — he will rely upon in this case.

The complaint contains all the necessary allegations to sustain an action for false imprisonment or for malicious prosecution, and as the two causes of action were inconsistent the court should direct an election. This may be done on the trial or by motion before answer. Cassidy v. Daly, 11 Week. Dig. 222; Tuthill v. Skidmore, 124 N. Y. 148.

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The defendant followed the latter practice, and his motion should have been granted. Order reversed, with costs.

FITZSIMONS, Ch. J., concurs.

Order reversed, with costs.

FREDERICK T. MASON, Appellant, *v.* FREDERICK TIETIG, Respondent.

(City Court of New York, General Term, April, 1898.)

1. **Lease to a firm — Continued occupation by one partner does not renew the lease.**

   Where premises have been rented to a firm, occupation by a single partner, after the expiration of the original term, does not renew the lease nor constitute a holding over by him under it.

2. **Lease for an indefinite term — Duration — Holding over.**

   A person thus in occupation of premises in the city of New York until some time in June, under an indefinite agreement as to the duration of his occupation, must, under 2 R. S., 9th ed., p. 1818, § 1, the special statute applicable to that city, be deemed entitled to a valid term until the first day of the ensuing May and where he remains in possession after that day, the yearly letting thus created continues for another year.

APPEAL from a judgment entered upon a verdict in favor of defendant and from an order denying a motion for a new trial.

Charles T. Terry, for appellant.

James S. Lehmaier, for respondent.

O'DWYER, J. The possession by the defendant of No. 17 Wooster street, after February 1, 1896, was not taken under the original lease. It is true that when a tenant under a lease for a year holds over after the expiration of the year, he may at the election of the landlord be held as a tenant for another year, under the terms of the lease. But that is not this case.

The defendant was not the tenant under the original lease. That he was a member of the firm who were the tenants has no effect

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whatever. As he was not the tenant under the lease he could not be deemed to hold over under the lease. James v. Pope, 19 N. Y. 324; Buchanan v. Whitman, 151 id. 257.

We must now consider the defendant's liability, if any, by reason of the transactions had which put him in possession of the premises No. 17 Wooster street. From a careful examination of the evidence it is clear that the renting of those premises was not from month to month, and there is no evidence to support a finding that there was a lease from June 1, 1896, for one year.

The plaintiff testifies that nothing was said, with respect to the term that the defendant should have and in this statement he is supported by the defendant who testifies that nothing was said about the term or amount of rental. It then appears from the defendant's testimony that he took possession of the premises some time in June, 1896. In view of the fact that the premises were not let for the definite term of one year it becomes necessary to consider the effect of the statute providing that "Agreements for the occupation of land or tenements, in the city of New York, which shall not particularly specify the duration of such occupation, shall be deemed valid until the first day of May next after the possession under such agreement shall commence," 2 R. S. (9th ed.), 1818, § 1.

From the evidence it is clear that this hiring was governed by the statute and the time would continue until the 1st of May, following and the tenant having remained in possession thereafter the yearly letting thus created would continue for another year. Douglass v. Seiferd, 18 Misc. Rep. 188.

It is contended by the respondent that from the cross-examination of the plaintiff's witness, it appears that a specified yearly hiring was shown to take effect from the 1st of June, but the evidence fails to support any such claim. Both plaintiff and defendant have testified that nothing was said about the term.

The judgment and order appealed from should be reversed and a new trial ordered, with costs to the appellant to abide the event.

FITZSIMONS, Ch. J., and CONLAN, J., concur.

Judgment and order reversed and new trial ordered, with costs to appellant to abide event.

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FRANK SEAMAN, Appellant, *v.* ANNA B. McCLOSKY, Respondent.

(City Court of New York, General Term, April, 1898.)

City Court of New York — Service, as of course, of an amended answer, after a reply.

The plaintiff, in an action in the City Court of New York, served an amended complaint on May 7; on May 15, the defendant served an answer to the same, setting up a counterclaim; on June 1, the plaintiff served a reply by mail, and on June 12 the defendant served an amended answer, as of course.

Held, that the amended answer was in time as the defendant had twelve days to serve it after the service, by mail, of the reply.

APPEAL from an order requiring the plaintiff to receive defendant's amended answer and counterclaim.

Henry J. McCormick, for appellant.

Alexander B. Halliday, for respondent.

O'DWYER, J. On May 7, 1897, plaintiff served an amended complaint; on May 15th, the defendant served an answer thereto containing a counterclaim; on June 12th, the defendant served her amended answer to the amended complaint. This amended answer was returned and acceptance thereof refused upon the ground that the time in which to amend as of course, had expired. It is not questioned, but that the defendant was entitled to amend her answer as of course, but it is insisted that she should have done so within six days after the service thereof and having failed to amend her answer within that time the right to do so was lost. Section 542 of the Code of Civil Procedure, provides:

"Within twenty days after a pleading, or the answer or demurrer thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended by the party, of course, without costs, etc."

The answer in this case alleged a counterclaim which required a reply and to which a reply was served. The reply is the plaintiff's pleading in answer to new matter by way of counterclaim set up by the defendant and is an answer to a pleading intended by the provisions of the section of the Code quoted.

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The term "answer," relates to pleadings of fact exclusively, and it includes a reply as well as an answer. Toomey v. Andrews, 48 How. Pr. 332-335.

The reply in this case having been served by mail on June 1st, the defendant had twelve days in which to amend her answer as of course. The amended answer was served on June 12th, and, therefore, was within the proper time.

The order appealed from should be affirmed, with costs.

CONLAN, J., concurs.

Order affirmed, with costs.

Matter of an Application to Revoke and Cancel Liquor Tax Certificate No. 14,111, granted to BERNARD E. McCUSKER.

(Supreme Court, Ulster Special Term, April, 1898.)

Liquor Tax Law — A corner building used as a saloon — Measurement of 200 feet from its entrance to that of a synagogue around the corner — When a building is used "exclusively" as a church — Occupation as a saloon, prior to March 3, 1896, shown by a stipulation.

Upon an application to revoke a liquor tax certificate, it appeared that the saloon in question was on the corner of Division and Third streets and that a synagogue adjoined it on Third street. An entrance to the saloon from Third street had never been used by the licensee; he had boarded it up and had extended a portion of his bar beyond the interior opening of this entrance. The center of the main entrance on Division street, although around the corner, was within 200 feet of the center of the nearest entrance of the synagogue, when measured in a straight line. Held, that the building was within the inhibition of the statute (Laws of 1896, chap. 112, § 24, subd. 2, as amended by Laws of 1897, chap. 312). It appeared that the basement of the synagogue was rented by its trustees to five societies connected with the synagogue and largely composed of its members and that the rentals were used to maintain the synagogue. Held, that the synagogue was occupied "exclusively" as a church, within the meaning of the statute.

Where the parties to such a proceeding stipulate that the premises "have been regularly licensed and occupied continuously as a saloon

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for the sale of liquor for a period of at least ten years," before April 6, 1898, the premises are clearly within the statutory exemption given to a place in which traffic in liquors was actually carried on, on the 3d day of March, 1896.

Parties by their stipulations may make the law for any legal proceeding in which they are impleaded, which not only binds them, but which the courts are bound to enforce.

APPLICATION for the revocation of a liquor tax certificate.

George E. Sands, for petitioner.

Howard & Peck, for county treasurer of Rensselaer county.

Frederick A. Chew, for Bernard E. McCusker.

CLEARWATER, J. This is an application for the revocation of a liquor tax certificate upon the grounds:

1. That the traffic is conducted in a building on the same street and within 200 feet of a church.

2. That the defendant made false statements in the application for the transfer of his certificate.

The matter is submitted upon the petition, answer and the testimony taken before a referee.

The defendant originally obtained a liquor tax certificate for the carrying on of his business at Nos. 28 and 30 Division street in the city of Troy, a building owned by his sister, who terminated his lease, and let the property to two other brothers, whereupon the defendant had his certificate transferred to a building upon the southwest corner of Third and Division streets in that city. As originally constructed, the latter building had three entrances on Division, and one on Third street. The entrance on Third street has never been used by the defendant, is nailed up and permanently closed, and a portion of the bar projects beyond the interior opening. On the adjoining lot upon Third street is the Jewish Synagogue of Berith Sholom.

Chapter 112 of the Laws of 1896, prohibited traffic in liquor in any building on the same street and within 200 feet of a building occupied exclusively as a church, the measurement to be taken from the center of the nearest entrance of the church to the center of

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nearest entrance of the place in which the traffic was to be carried on (§ 24, sub. 2), and it has been held that a building situate upon a corner of two streets is within the inhibition of the act notwithstanding it fronts on a different street from the church. People ex rel. Clausen v. Murray, 5 App. Div. Rep. 441; Matter of Zinzow, 18 Misc. Rep. 653.

By chapter 312 of the Laws of 1897, however, the law was amended so as to provide that the measurement shall be taken *in a straight line* from the center of the nearest entrance of the church to the center of the nearest entrance of the place in which the traffic is to be carried on. Sec. 24, sub. 2.

It is claimed by the defendant that this means that the measurement must be made in a line as the street runs, and if thus made, the Division street entrance cannot be reached, as to include it, it is necessary on reaching the corner of Third street, to turn at right angles.

I do not so understand the law. A straight line is one free from angularities or curvatures, and is the shortest and most direct distrance between two points. Thus measured all the Division street entrances are within the prohibited distance.

It is also claimed by the defendant that the synagogue is not a building occupied exclusively as a church within the meaning of the statute.

Five societies: The Independent Order of Benai Berith, The Independent Order of Kesher Shel Barsel, The Free Sons of Israel, The Sisterhood Benevolent Society, and The Young Peoples' Association, meet in the basement and pay the trustees of the synagogue a small rental, which defrays the expense of light, fuel and the service of a janitor. This rent goes into the treasury of the synagogue, and is used for its maintenance. Membership in these societies is confined to persons of the Jewish faith, and their object is the union of Israelites in promoting the interests of the race, elevating the character of the Jewish people, inculcating principles of philanthropy, honor and patriotism, the support of science and art, alleviating the wants of the poor, visiting the sick, aiding the victims of persecution and protecting and assisting the widow and orphan. They are of a sectarian, but not of a religious character. Ninety per cent. of their members are members of the congregation of Berith Sholom and the principal reason for using the basement of the temple as a place of meeting, is to aid its congregation in defraying its expenses.

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I do not think that this use of the basement of the synagogue by these benevolent societies is at all inconsistent with its use as a place of worship; nor do I think that its effect is to deprive the synagogue of the protection of the act. The precise shade of meaning to be given to the term "exclusively," has been so recently and fully discussed in the case of the People ex rel. Young Men's Association of Albany v. Sayles, 23 Misc. Rep. 1, that it is unnecessary to reiterate here the views there expressed. They are in accord with the authorities to which reference is made in the opinion in that case, and are controlling here.

It is but proper to add, that this proceeding is not prosecuted by any person connected with the synagogue, but by one Richard N. Holden, who admits entertaining a feeling of bitter hostility to the defendant, and whose action it is charged, is inspired in part by this ill-will, and in part by the brothers of the defendant who succeeded him as tenants of his sister's property. While the animus of the complainant is not specially pertinent, it is entirely apparent.

The act of 1897, provided, however, that the prohibition relative to a church, should not apply to a place in which traffic in liquor was actually carried on, on the 3d day of March, 1896.

At the close of all the testimony before the referee, the following stipulation assented to by counsel for all the parties was entered upon the minutes and is reported with them to the court:

"*April* 6, 1898.

It is admitted by the counsel for the respective parties, that the premises now occupied by Bernard E. McCusker as a saloon, to-wit, Nos. 60 and 62 Division street, or 161 Third street, as the case may be, have been regularly licensed and occupied continuously as a saloon for the sale of liquor for a period of at least ten years, without any interruption or cessation in the business up to the present time and that no other business except a saloon business was carried on there."

Parties by their stipulations, may in many ways make the law for any legal proceeding in which they are impleaded, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory and even constitutional rights. They may stipulate for shorter limitations of time for bringing actions than are prescribed by statute. They may stipulate that the decision of a court shall be final and thus waive the right of appeal; and all stipulations made by parties for the government of their

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conduct, the control of their rights or for the guidance of the court in the trial of a cause or the conduct of litigation of any character not unreasonable or against good morals or public policy will be enforced by the courts. Matter of Petition of New York, Lackawanna & Western Railroad Co., 98 N. Y. 447-453; Buel v. Trustees of Lockport, 3 id. 197; Embury v. Conner, id. 511; Sherman v. McKeon, 38 id. 266; Allen v. Commissioners, etc., id. 312; Vose v. Cockcroft, 44 id. 415; Phyfe v. Eimer, 45 id. 102; De Grove v. Insurance Co., 61 id. 594; Ogdensburgh & L. C. R. R. Co. v. V. & C. R. R. Co., 63 id. 176; Wilkinson v. Insurance Co., 72 id. 499; Baird v. Mayor, 74 id. 382; Hilton v. Fonda, 86 id. 339; Steen v. Insurance Co., 89 id. 315; Matter of Cooper, 93 id. 507; Stedeker v. Bernard, id. 589.

Although the statute uses the adverb "lawfully," and the stipulation "regularly," it is, so far as this proceeding is concerned, an idle waste of time and words to undertake to distinguish them in meaning. Regularly, in common English means: Constituted, appointed, or conducted in the proper manner; conformable to law or custom; duly authorized. And if as agreed by all the parties to this proceeding, the premises of the defendant were regularly thus licensed and occupied continuously at least nine years prior to the passage of the act of 1897, they are clearly within the exemption.

This stipulation renders further discussion of the case useless, and the application to revoke the defendant's license is denied, with such costs and disbursements as are properly taxable in a special proceeding.

Ordered accordingly.

Matter of the Probate of the Last Will and Testament of William D. Robertson, Deceased.

(Surrogate's Court, Washington County, April, 1898.)

1. An executor cannot procure, under Code Civil Procedure, § 2624, a construction by a surrogate of a bequest of personalty.

A mere executor and proponent of a will has not sufficient interest in the estate of his testator to entitle him to invoke the jurisdiction given to a surrogate by section 2624 of the Code of Civil Procedure,

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to determine the validity, construction or effect of a disposition of personal property contained in the will of a resident of the state of New York, executed within the state, when the disposition is expressly put in issue by a "party."

2. **Bequests of personalty to foreign religious corporations — Power to take is governed by the law of the domicile of the donee.**

Where boards of missions, incorporated in a foreign state, are forbidden by its statutes to take bequests under any will unless the will was made one calendar month before the decease of the testator, they cannot take bequests under a will of personal property, situated in this state, which was made by a resident testator twenty-six days before his death and this, although such bequests would be valid under the laws of this state.

PROCEEDINGS upon probate of a will.

C. C. Van Kirk, for proponents.

John B. Conway, for contestants.

INGALSBE, S. The testator died July 6, 1897. His will was executed within the state, June 10, 1897, less than one calendar month before his death. At the time of the execution of his will, and at his death he was a resident of the state of New York. He left eight nephews and nieces as his only next of kin and heirs-at-law. The amount of personal property disposed of in the twentieth and residuary clause of his will is upwards of $15,000. none of the assets of the decedent were located at the time of his death in the state of Pennsylvania.

The second and twentieth clauses of his will read as follows:

"Second: I give, will and bequeath to the Boards of Missions of the United Presbyterian Church of North America, the sum of three thousand ($3,000) dollars, one thousand ($1,000) dollars of which is to be used for the benefit and use of the Home Mission Work, one thousand ($1,000) for the benefit and use of the Freedman's Mission Work, and the other one thousand ($1,000) dollars to be for the benefit and use of foreign missions, and I direct that a receipt for said amount from the treasurer or other proper officer of said Board of Missions shall be a sufficient receipt or voucher for my executors on their final settlement and conclusive as such.

"Twentieth: I give, will and bequeath all the rest, residue and

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remainder of my estate of every name and nature to my grand niece Stella Small and the Boards of Missions of the United Presbyterian Church of North America, to be divided equally between them each to have one-quarter."

The Boards of Missions of the United Presbyterian Church of North America mentioned in these clauses are each duly incorporated under the laws of the state of Pennsylvania and bear the following names: "The Board of Home Missions of the United Presbyterian Church of North America," "The Board of Missions to the Freedmen of the General Assembly of the United Presbyterian Church of North America," and "The Board of Foreign Missions of the United Presbyterian Church of North America." The objects and purposes of each of these boards are religious and charitable, and the legacies in the second and twentieth clauses of the will, to these societies, are for such objects and purposes.

John Mc. A. Reid, an executor and one of the petitioners for the probate of the will presents an answer to the petition and seeks to put in issue the validity, construction and effect of the disposition of personal property to the Boards of Missions provided for, in the second and twentieth clauses of the will. The answer is presented under section 2624 of the Code, which provides that "If a party expressly puts in issue before the surrogate, the validity, construction or effect of any disposition of personal property contained in a will of a resident of the state executed within the state, the surrogate must determine the question."

Under the reading of this clause it is claimed that Mr. Reid can present this issue, for he is a party to the proceeding. But he is one of the proponents. He is not a legatee or next of kin. His primary duty is to see that the will is probated, and not that it is declared invalid either in whole or in part. He has no interest in the estate except as an executor of the will.

Section 2624 is a general enactment along the line of an earlier statute applying to the Surrogate's Court of the county of New York. This statute, chapter 359, Laws of 1870, reads, "in case the validity of any of the dispositions contained in such will is contested, or their construction or legal effect called in question, by any of the heirs, or next of kin of the deceased, or any legatee or devisee named in the will, the surrogate shall have the same power and jurisdiction as is now vested in and exercised by, the Supreme Court, to pass upon and determine the true construction, validity and legal effect thereof."

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Commissioner Throop in his note to section 2624 of the Code, says that it was taken from this provision of the law of 1870, and that "It has been so formed as to confine its application to a strictly domestic will, and to a will of personal property, and as thus amended, the provision has been extended to all Surrogate's Courts." Thus evidently it was not the intention of the codifier to alter or vary the meaning of the act of 1870, except to restrict it, in certain particulars. Under the provisions of that act there is no question, but that Mr. Reid would be precluded from interposing his answer herein raising the question of validity.

It would seem on general principles of interpretation that no person should be entitled to an adjudication under this section as to the validity of a will, unless he claims some interest under it, in the personalty bequeathed, or, that by reason of some invalid disposition of such personalty he is entitled to a share of the same under the statute of distributions. Mr. Reid occupies neither of these positions. He is not a legatee or one of the next of kin of the decedent. He has no such interest as should enable him to invoke the jurisdiction of this court under section 2624.

Mary E. Robertson, a niece and one of the next of kin of the decedent and a legatee named in the will also intervenes and interposes an answer to the petition herein, asking that the "disposition of personal property in said will contained to said Boards of Missions be adjudged illegal, invalid and void."

In support of this contention a Pennsylvania statute enacted in 1855 is cited. This law is entitled "An act relating to corporations and to estates held for corporate, religious and charitable uses." We are concerned only with the eleventh and fifteenth sections of this act, which read as follows:

Section 11. "No estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and at the same time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor, and all dispositions of property contrary hereto, shall be void, and go to the residuary legatee or devisee, next of kin or heirs, according to law, provided that any dispositions of property within said period, *bona fide*, made for a fair, valuable consideration, shall not be hereby avoided."

Section 15. "All dispositions of property hereafter made to religious, charitable, literary, or scientific uses, and all incorpora-

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tions or associations formed for such objects shall be taken to have been made and formed under, and in subordination to all the duties and requirements of this act, as rules of property and laws for their government."

In the case of Kerr v. Dougherty, 79 N. Y. 327, the decedent's will was executed, December 8, 1896. He was a resident of the state of New York, and died December 31, 1896, within one calendar month after its execution. In the tenth clause of his will he bequeathed the sum of $5,000 to the trustees of the General Assembly of the Presbyterian Church of the United States of America, for religious and charitable purposes. The legatee was a corporation organized under the laws of the state of Pennsylvania, for religious and charitable objects. In that case the Court of Appeals held that the bequest being in contravention of the Pennsylvania statute of 1855, was void in Pennsylvania, where the legatee was organized and had a domicile, and was consequently void in New York where the testator resided. In the prevailing opinion, the majority of the court fortified its position by reference to an earlier decision in the same court, Chamberlain v. Chamberlain, 43 N. Y. 424, in which it was held that the validity of the bequests of a will, will depend on the law of the legatee's domicile and of the government to which the fund is to be transmitted for administration. Judge Allen in this earlier case wrote "Whatever may be the law of Pennsylvania, a testator domiciled in that state cannot establish by bequests of personalty to citizens or corporations of this state, a charity or trust to be administered here inconsistent with the policy or the laws of this state. A gift by will of a citizen of this state to a charity, or upon a trust to be administered in a sister state, which would be lawful in this state, the domicile of the donor, would not be sustained, if it was not in accordance with the laws of the state, in which the fund was to be administered."

In every essential fact the case at bar is precisely similar to that of Kerr v. Dougherty. In no way can they be distinguished nor can any distinction be drawn between them as to the facts or principles involved.

The learned counsel for the proponent claims, however, that the decision of the court in Kerr v. Dougherty has been overruled by later decisions in every principle, that applies to the case under consideration.

In support of this contention he cites Hope v. Brewer, 136 N. Y. 138. In this case it is simply held that bequests valid at the

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testator's residence are valid everywhere, if the legatees have the legal capacity to take and administer the bequests. In Kerr v. Dougherty it is decided that the limitation of the Pennsylvania statute applied to the power to take as well as to the power to give and that the legatee in that case had no power to take. There is no variance in these holdings of the court. The doctrine enunciated in Hope v. Brewer indeed, distinctly affirms that laid down in Kerr v. Dougherty.

The proponent also cites the case of Dammert v. Osborn, 140 N. Y. 30. A careful study, however, of the very able opinion in that case shows conclusively that the decision is not in conflict with that of Kerr v. Dougherty, but rather in entire harmony with it. In Dammert v. Osborn the testator was domiciled and died in Peru, but his property at the time of his death was largely within this state. In his will he provided for the establishment in New York city of a home for poor children. It was contended that the legacy was void because in contravention of the statutes of New York against perpetuities. Judge O'Brien in his opinion says, "The law allows and in every proper way encourages such gifts, and sustains them, when capable of execution. * * * There is no law that forbids gifts to charity here by testators in other countries, or that requires us to reject the gift unless it is made in all respects, in conformity with our local law. * * * When that statute (as to suspension of alienation) was passed it was not within the legislative purpose to interdict dispositions made in other countries, to take effect here. There is nothing in the language used that indicates such a purpose. * * * Our law permits the citizens or subjects of other countries to dispense charity here in such measure as they wish and according to such methods as their own laws prescribes." Evidently the learned judge had in mind the case of Kerr v. Dougherty in which it is expressly held that in Pennsylvania under the statute of 1855, the right to take the bequest was absolutely denied. Our statutes allow such bequests while the law of Pennsylvania forbids them. The decision in Dammert v. Osborn not only does not conflict with that of Kerr v. Dougherty, but is in full agreement with it.

It is further argued against the acceptance in this court of the decision in Kerr v. Dougherty, that Judge Earl dissented from the doctrine as promulgated by a majority of the court and that he wrote a very able and logical dissenting opinion. This is correct, but four years later in writing upon the same question, in

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Hollis v. Drew Theological Seminary, 95 N. Y. 166, he held that gifts to charitable, benevolent, scientific or educational institutions are not against public policy and that there is no public policy outside of the statutes which condemns testamentary gifts as to such institutions, which was precisely the theory of Kerr v. Dougherty where a statute is held to preclude the bequest. In his opinion in this case, Judge Earl expressly commends and confirms the decision of the court in Kerr v. Dougherty, in the following language: "There too, there was under consideration a bequest to a Pennsylvania corporation, and if that bequest had been void as against the public policy of this state there would have been no occasion to resort to the law of Pennsylvania and to hold, as we did, that the bequest was void because of an act of that state which prohibited such bequests by a will, executed within a month before the death of the testator."

The decision of a Pennsylvania court of inferior jurisdiction, Hildeburn's Estate, 16 Co. Ct. Rep. 39, is cited which construes the statute of 1855 differently from the Court of Appeals of New York. This County Court decision holds that Pennsylvania corporations are not by that act precluded from taking bequests valid at the place of the testator's residence.

Under the well-established rules of *res judicata* this decision of an inferior court in a foreign jurisdiction can receive nonconsideration here as against the authority of our own court of highest appellate jurisdiction.

Moreover the courts of our state have considered the question involved, since this decision was rendered in the inferior Pennsylvania court. In Carter v. Board of Education of Presbyterian Church, 68 Hun, 436, the validity of a bequest to the defendant, a Pennsylvania corporation whose purposes were religious and charitable, was in controversy. The testator died within one calendar month after the execution of his will. The General Term unanimously adjudged the bequest to the board of education void, citing Kerr v. Dougherty as authority. This was several years after the County Court of Pennsylvania had rendered its decision. The case was carried to the Court of Appeals and there the phase of it which is of interest to us was disposed of in the following language in the opinion of Judge Gray, 144 N. Y. 621. "Two of the specific bequests to the religious corporations (one of which was the one to the board of education), were declared to be invalid, and their invalidity is not in question here."

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Thus as late as 1893 the authority of Kerr v. Dougherty was distinctly reaffirmed in this state by the Supreme Court at General Term and in 1895 the doctrine of that case was recognized by the Court of Appeals.

A decree should be entered herein admitting the will of the decedent to probate; dismissing the answer of the executor and petitioner John Mc. A. Reid, declaring the second clause of the said will invalid and void, and adjudging the twentieth clause thereof, also invalid and void so far as the same bequests of the personal property of the decedent to the Boards of Missions of the United Presbyterian Church of North America.

Decreed accordingly.

JOHN TUTTLE, Respondent, *v.* THOMAS P. GALLIGAN et al., Appellants.

(Supreme Court, Appellate Term, May, 1898.)

Municipal Court of New York — Tender of undertaking to remove case to City Court — Jurisdiction — Code Civ. Pro., § 3216.

Where, in an action in a district Municipal Court of the City of New York, in which damages in excess of $100 are claimed, the defendants, immediately upon the joining of issue, tender the statutory undertaking required by section 3216 of the Code of Civil Procedure, for the removal of the case to the City Court, the jurisdiction of the justice is arrested until he has acted upon the undertaking. Pending such action he has no power to authorize a discontinuance.

APPEAL from a decision of the Municipal Court of the City of New York, borough of Manhattan, sixth district, discontinuing the above-entitled action.

Nadal, Smyth, Carrere & Trafford (Edward P. Mowton, of counsel), for appellants.

Sidney J. Cowen, for respondent.

BEEKMAN, P. J. This action was brought in the Municipal Court of the City of New York, borough of Manhattan, sixth dis-

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trict, for the recovery of the sum of $500 damages for personal injuries alleged to have been caused by the negligence of the defendants. Upon the return day of the summons the defendants appeared by their attorneys, pleaded a general denial, and thereupon applied for an order removing the action into the City Court of New York, at the same time tendering the undertaking required by law in such a case. Section 3216, Code of Civil Procedure. Upon this the attorney for the plaintiff immediately asked leave to discontinue, which was granted by the justice, and judgment dismissing the complaint, with costs, seems to have been rendered accordingly. From this determination the defendants appeal to this court.

Section 3216 is mandatory in its character, and where the motion is timely, as it was here, requires the justice to make the order of removal upon the defendant filing with the clerk an undertaking, the nature of which is prescribed. It has been held that when such an undertaking is prepared and delivered for approval, the power of the justice in the case ceases until he disposes of the new element thus introduced. Hogan v. Devlin, 2 Daly, 184; Warren v. Campbell, 14 N. Y. Supp. 165.

In the case first cited, the court says (p. 186): "He (the justice), may be authorized to adjourn the action for the purpose of informing himself of the sufficiency of the sureties, but this would be the limit of his power. The undertaking is designed to destroy his jurisdiction, and it arrests it for the time being, and, indeed, until he has approved the undertaking or refused to do so."

In the case at bar the justice refused to consider the undertaking at all or to entertain the defendants' application, as he was clearly bound to do, but as has been stated, granted a discontinuance and awarded a judgment of nonsuit accordingly, with costs, as provided in section 1383 of the New York City Consolidation Act. It is plain under the authorities that he had no power to do so, and that for this error the judgment must be reversed. While a plaintiff in these courts has a right to discontinue at any stage of the action before it is finally submitted, it is obvious, in the nature of things, that the right cannot be asserted at a time when the limitations upon the power of the justice, imposed through the operation of another provision of law, are such that he cannot act upon the application.

Judgment reversed, with costs, and cause remitted to the court below for action upon the defendants' motion for removal.

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GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed, with costs, and cause remitted to court below for action upon defendants' motion for removal.

MERRITT D. WALCOTT, Appellant, *v.* FRANK HILMAN, Respondent.

(Supreme Court, Appellate Term, May, 1898.)

Actions — Right of assignee to sue, where the transfer is legal.

Where a cause of action has been duly transferred, the assignee has a right to sue and the fact that the assignor testifies, upon the trial, that he expects to receive the amount of any recovery is immaterial and does not justify a dismissal of the complaint.

APPEAL from judgment of the Municipal Court of the City of New York, borough of Manhattan, eighth district, dismissing the complaint.

H. B. Bradbury, for appellant.

No appearance for respondent.

BEEKMAN, P. J. The justice below dismissed the complaint solely on the ground as stated by him "that the assignment as sworn to by witness shows collusion with assignee," plaintiff's assignor having testified that he expected to receive from the plaintiff the amount of any recovery that might be obtained in the action. This was error for which the judgment must be reversed. As between the assignor and the assignee there was a legal transfer of the cause of action, and this was sufficient to make the plaintiff the real party in interest for the purpose of maintaining the action. The question has been well settled by authority and requires no further discussion from us. Sheridan v. Mayor, 68 N. Y. 30, 32; Hecht v. Mothner, 4 Misc. Rep. 536; Curran v. Weiss, 6 id. 138, 139.

Judgment reversed, and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and a new trial ordered, with costs to appellant to abide event.

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BRIDGET GEELAN, Respondent, v. SARAH E. COOKE, Appellant.

(Supreme Court, Appellate Term, May, 1898.)

Negligence — A person injured in an auction-room by the act of a third party.

The proprietor of a public auction-room is not liable to an intending bidder who, while standing in the room with her back to three tables placed on top of each other, was injured because a stranger, while handling the uppermost table, permitted it to fall upon the bidder.

APPEAL from a judgment rendered in the Municipal Court of the City of New York, borough of Manhattan, ninth district, in favor of the plaintiff.

Benjamin & Loeser, for appellant.

O. J. Hochstadter, for respondent.

BEEKMAN, P. J. The plaintiff has recovered judgment against the defendant for damages, flowing from injuries which she has alleged and which the court below has found to have been caused by the negligence of the defendant. The facts of the case are practically undisputed. The plaintiff testified that she went into the auction room of the defendant, who seems to have been engaged in the business of selling furniture and other articles at public auction, for the purpose of bidding at a sale which was then going on in that place. After she had entered the store, she observed, among other property apparently to be sold, three tables which were placed one upon the other, the table at the top being a small one weighing about ten pounds. She states that she was standing with her back to these tables when she heard a rattle behind her, and was immediately struck by the falling of the upper table and suffered the injuries complained of. The witnesses on behalf of the defendant testified that the fall of the table was occasioned by the act of a stranger who was attending the sale and who was seen by them handling the table, and that it fell while it was in his hands. This testimony was given not only by an employee of the defendant, but also by another person, a bystander, who was entirely disinterested. The evidence thus given was not contradicted by the plaintiff. She herself was not in a position to ob-

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serve the cause of the occurrence, nor did she produce any witness for the purpose of giving any other version of it. Upon this state of the fact it is obvious that there was no evidence of negligence on the part of the defendant, and the justice below should have dismissed the complaint. Steiker v. Plath, 19 App. Div. 376.

Judgment reversed and a new trial ordered, with costs to the appellant, to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

JACOB STAHL et al., Appellants, *v.* HERMAN DOHRMAN, Respondent.

(Supreme Court, Appellate Term, May, 1898.)

Conversion — Possession gained by fraud — Demand.

The proof in an action for a conversion tended to show that the defendant had been the manager of a liquor and cigar store; that during this period his principal had bought goods of the plaintiffs which were billed and delivered to the principal's store, but were paid for by the checks of the defendant, whom the plaintiffs knew to be the manager; that after the defendant had bought out the principal he, without disclosing the change in ownership, bought the goods in question, which were billed to the principal, delivered at the same store but were never paid for by any one. One of the plaintiffs testified that they would not have sold goods to the defendant personally.

Held, that the goods had never been sold to any one; that the defendant had obtained them by a fraud; that no demand of him was necessary, and that a dismisssal of the complaint was erroneous.

APPEAL from a judgment of the Municipal Court of the City of New York for the second district, borough of the Bronx, in favor of the defendant.

Wahle & Stone, for appellants.

C. L. Burger, for respondent.

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GILDERSLEEVE, J. Previous to October 1, 1895, one Frederick Hackman kept a liquor and cigar store, at the corner of Fiftieth street and Third avenue, in this city. Defendant was his manager. For a number of years, prior to this month of October, 1895, the plaintiffs, who were cigarmakers, had been in the custom of selling cigars to said Hackman, for use in said liquor and cigar store. These cigars were always billed to Hackman, but were usually paid for by the checks of his different managers, Hackman being, apparently, in poor health, and away a considerable portion of the time; and, while defendant was such manager, the cigars were paid for by the personal check of the defendant. The defendant had been presented to plaintiffs by Hackman as his manager, and it was as such that they knew him. On or about October 1, 1895, this liquor and cigar store was sold by Hackman to the defendant; but nothing was said to plaintiffs of the change of ownership, and cigars continued to be billed to Hackman and to be paid for by checks signed by defendant. Upon this point, defendant testifies as follows: "Q. You kept taking these goods billed to Hackman, without saying you were the owner? A. Hackman said it was not necessary to notify any one. I asked him if I should notify them (plaintiffs), and he said it was not necessary. Q. What directions were given by you for the sale and delivery? A. I told him (plaintiffs' representative) to send me the cigars, and to bill them in Hackman's name. Q. And you did not tell anybody? A. That is right. Q. And you paid for the cigars? A. Yes, sir." The receipts for such cigars, so delivered at the store in question, were given in the name of defendant. On March 10, 1897, defendant ordered 2,000 cigars of plaintiffs, which were, as usual, billed to Hackman, and delivered at the said store and were receipted for, as usual, in the name of defendant. These cigars were disposed of by defendant, and have never been paid for. Plaintiffs brought this action for a conversion, and the trial justice gave judgment for defendant. We are of opinion that this decision was erroneous.

The uncontradicted evidence establishes the fact that plaintiffs believed they were selling to Hackman, and had good reason for so supposing, and that the credit was given to Hackman, and not to the defendant. One of the plaintiffs swears that they would not have sold had they known that the defendant was the purchaser. It clearly appears, therefore, that there was no meeting of the minds, as between plaintiffs and defendant, and no sale was effected as between them. See Rodliff v. Dallinger, 141 Mass. 5;

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also Fullerton v. Dalton, 58 Barb. 236; affirmed, 49 N. Y. 659. The defendant assumed to buy the goods on Hackman's account and as his agent, when in fact that agency had been terminated, and he really intended to obtain possession of the property and sell it on his own account. He knew that the plaintiffs believed that they were selling to Hackman, and that when they delivered the goods they tendered them to him as Hackman's agent, believing that he was authorized to receive them for Hackman's account. With this knowledge he took the goods into his possession, intending to appropriate them to his own use. This was a plain fraud upon the plaintiffs. The possession of the property by the defendant was, therefore, never a lawful one, and no title, not even colorable, was ever vested in him. The moment he thus possessed himself of the property in question he was, therefore, guilty of a conversion, and no demand was necessary to make the plaintiffs' right of action against him complete. Pease v. Smith, 61 N. Y. 477; Smith v. Smalley, 19 App. Div. 521; Hamet v. Letcher, 37 Ohio, 356. There was no sale of the property to anyone. It is self-evident that there was none to the defendant, and it is equally plain that there was none to Hackman. The plaintiffs may have had a right to recover the price of the goods from Hackman, but only on the ground that he was estopped by his conduct from denying Dohrman's agency. They were not, however, bound to take this position, but were at liberty to deal with the case upon the facts as they actually existed. It is clear that there was a tortious conversion of the property, and that the plaintiffs were entitled to judgment in their favor. It was, therefore, error to dismiss the complaint.

Judgment reversed and a new trial ordered, with costs to the appellants to abide the event.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

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NATHAN BERNSTEIN, Respondent, v. ERNESTINE HEINEMANN et al., Appellants.

(Supreme Court, Appellate Term, May, 1898.)

1. **Lease — Effect of a person, not a party, signing a renewal lease — Surety.**

One who signed a renewal lease in which his name was not mentioned (upon his contention, as a mere witness), cannot, in the absence of any accompanying or explanatory words, be held liable as a principal; nor as a surety, where no consideration for such an obligation is expressed in the instrument.

2. **Same — Rent payable in advance, followed by dispossession during the term.**

Where rent is payable in advance, a tenant dispossessed during the month for nonpayment, is liable for the rent of the entire month.

3. **Same — Deposit for security — When a counterclaim to rent due.**

Where it is understood between parties that a deposit, made by the tenant, is intended to secure the landlord only for rent and for such repairs as the tenant fails to make, she may counterclaim her deposit against rent due, although the instrument, under which the deposit was made, states that the security shall "be forfeited for the nonperformance in its entirety of said lease".

APPEAL by the defendants from a judgment of the Municipal Court of the City of New York, borough of Manhattan, fourth district, rendered in favor of the plaintiff, by the justice thereof, without a jury.

The nature of the action and the material facts are stated in the opinion.

August P. Wagener, for appellants.

N. S. Levy, for respondent.

GIEGERICH, J. This action was brought to recover the sum of $65, for one month's rent alleged to be due from the defendants on the 1st day of September, 1897, under a written lease bearing date April 21, 1895, of "the rooms in the front house over the store known as No. 130 Forsyth street in the city, county and state of New York," made and executed by the plaintiff, to the defendant

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Ernestine Heinemann for the term of one year from May 1, 1895, at the yearly rent or sum of $900, payable monthly in advance on the first day of each month, and written renewals thereof, as hereafter mentioned.

The sum of $75 was deposited with the plaintiff "as security for the payment of rent as per lease dated April 21, 1895, for premises No. 130 Forsyth street in the city of New York, said security to be forfeited for the nonperformance in its entirety of said lease." And it was further understood between the parties, that in case of failure on the part of the lessee to make repairs, or to do the cleaning required on her part, the lessor might cause the same to be done and deduct the amount expended from the sum so deposited.

On the 2d day of September, 1897, summary proceedings were instituted by the plaintiff herein, as landlord against the said defendant Ernestine Heinemann, as tenant, for the recovery of the possession of the premises in question for nonpayment of one month's rent alleged to have become due and payable on said 1st day of September, 1897, and on the 8th day of September, 1897, a final order in favor of the former was made upon default of the latter on the return of the precept.

A warrant was issued, but the tenant voluntarily removed from the demised premises during the pendency of the proceedings.

The plaintiff then brought this action, but for some reason not accounted for, the sum of $65, only, is demanded instead of $75, called for by the lease. The pleadings are oral. The answer is a general denial, and sets up eviction, and a counterclaim for the sum deposited, as before stated.

The only proof connecting the defendant Bernard Heinemann with the transaction is the last renewal indorsed upon the face of that portion of the lease, termed "Tenant's Agreement," held by the plaintiff and admitted in evidence upon his offer. The same reads as follows: "This lease extended for one year from May 1, 1897, to May 1, 1898, with same conditions."

(Sg) ERNESTINE HEINEMANN,"
(Sg) B. HEINEMANN."

Witness
N. BERNSTEIN."

A duplicate of such renewal, written upon that portion of the lease termed "Landlord's Agreement," and signed by "N. Bern-

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stein and B. Heinemann" only, was admitted in evidence upon the defendants' offer. A prior extension was executed in duplicate, one being signed by the defendant Ernestine Heinemann, and the other by the plaintiff.

The defendant Bernard Heinemann testified that at the time he signed the paper writing, the plaintiff told him he wanted the signature of a witness, and at his request signed it as a witness, and not as principal. The plaintiff denied having made such a request, but the fact that the defendant Bernard Heinemann and the plaintiff both signed the last renewal in duplicate, while the defendant Ernestine Heinemann signed but one instrument, strongly supports the theory that said defendant Bernard Heinemann signed such paper writings as a witness only. This view is in harmony with the allegation of plaintiff's petition filed in said proceedings "that on or about the 1st day of May, 1897, said landlord entered into an agreement with Ernestine Heinemann, as tenant," and the final order made on default. Such adjudication established the matter so alleged, as well as the execution and validity of the lease, the occupation of the tenant, and that rent is due, and also as to any other facts which are required to be alleged as a basis of the proceedings (Reich v. Cochran, 151 N. Y. 122, 126; Grafton v. Brigham, 70 Hun, 131), and plaintiff is estopped from denying the same. Jones on Evidence, § 616.

It is apparent that the judgment as to Bernard Heinemann is against the weight of the evidence, and consequently the refusal to dismiss the complaint as to him was error. Schumacher v. Waring, 7 Misc. Rep. 161; McLaughlin v. Harriot, 14 id. 343. Besides the said defendant was not mentioned in the lease, or renewal or renewals thereof, and hence his signature without any accompanying or explanatory words did not render him liable for the rent, even on the theory that he signed the lease as surety for the lessee, since such an undertaking would be void under the Statute of Frauds by reason of the failure to express a consideration therefor. Evans v. Conklin, 71 Hun, 536.

It is insisted by the defendant Ernestine Heinemann that she is not liable for the rent in question because, although it was due in advance, she was dispossessed before the month expired for which it was payable; but the authorities hold that where rent is payable monthly in advance under a lease for one year, a landlord is entitled to a whole month's rent, notwithstanding the tenant is dispossessed by virtue of a warrant, issued in summary pro-

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ceedings before the expiration of the month, for default in payment. Boehm v. Rich, 13 Daly, 62; Rice v. Bliss, 66 How. Pr. 186; Fursman v. Fannaci, 2 N. Y. Supp. 339; 1 McAdam's Landlord & Tenant, p. 660; 2 McAdam's Landlord & Tenant, Supp. 106; see Code of Civil Procedure, § 2253.

In the present case the rent was payable monthly, in advance on the first day of each month, and, therefore, the plaintiff became entitled to the whole month's rent on the first day of the month in question.

The next question arises in regard to the counterclaim for the sum deposited as security for the performance by the tenant of the covenants of the lease.

The defendant Ernestine Heinemann testified, that she received the paper writing pertaining to such deposit from the plaintiff upon the payment of said sum. The latter, on the other hand, testified that he received the money from her first husband, to whom, he says, he delivered said instrument. Such document, however, only mentions said defendant Ernestine Heinemann, and as it is undisputed that she was the lessee of the premises at the time of its delivery, it must be assumed, even if plaintiff's testimony upon this subject is credited, that it was delivered to such husband as the agent of his wife. Although the deposit was made as security for the term ending May 1, 1896, the renewal of the lease operated as a renewal of the agreement regarding such deposit. Wadsworth v. Wadsworth, 21 Week. Dig. 520; 2 McAdam's Landlord & Tenant, Supp. p. 72.

The plaintiff contends that the sum deposited was forfeited by reason of the nonperformance by the said defendant of the lease in its entirety. It is plain, however, that the intention of the parties was that the money so deposited should be held as security for the payment of the rent and for the reimbursement of the landlord for any expenditures incurred by him for repairs which the tenant might fail to make. Indeed, the agreement in that regard so states in express terms, and it will be so treated notwithstanding words which seem to import a forfeiture of the whole sum for nonperformance of the lease in its entirety. It is a familiar principle that the court will not construe a provision of this kind as in the nature of a penalty if the agreement between the parties is susceptible of any other construction. After applying so much of the security as may be necessary in order to satisfy his demands against the tenant, in accordance with the terms of the deposit, the latter

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is entitled to whatever surplus may remain. Scott v. Montells, 109 N. Y. 1; Chaude v. Shepard, 122 id. 397; Hawthorne v. Coursen, 18 Misc. Rep. 447. The counterclaim, to my mind, comes within the principle of the decisions above referred to, and the justice, therefore, erred in disallowing the same.

It follows that the judgment as to both defendants should be reversed and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

THE BRADLEY SALT CO., Appellant, *v.* HENRY MEINHOLD, et al., Respondents.

(Supreme Court, Appellate Term, May, 1898.)

Action for costs paid on an appeal from a District Court, the judgment having been reversed, with costs to abide the event — Code Civ. Pro., §§ 3047, 3060.

Costs paid by an appellant, under section 3047 of the Code of Civil Procedure, in order to perfect an appeal from a judgment of a District Court of the City of New York cannot, upon a reversal, with costs to abide the event, of the judgment appealed from, be collected by action of the respondents to whom they have been paid by the clerk; but if the appellant ultimately succeeds in the action, it is entitled, under section 3060 of the Code of Civil Procedure, to tax the costs as necessary disbursements on appeal.

APPEAL by the plaintiff from a judgment of the District Court in the city of New York, for the first judicial district, rendered in favor of the defendants, by the justice thereof, without a jury.

The nature of the action and the material facts are stated in the opinion.

J. E. Ludden, for appellant.

J. H. Denenholz, for respondents.

GIEGERICH, J. The defendants heretofore recovered a judgment against the plaintiff in one of the District Courts in the city of New

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York, which was reversed, with costs to the appellant to abide the event. The plaintiff, in order to perfect the appeal, paid to the clerk of the District Court the costs of the action, included in the judgment, the fee of the justice for making the return, and the fee of the stenographer for a copy of his minutes; amounting in all to the sum of $28.15. This sum was delivered to the defendants.

The defendants having refused to pay the plaintiff the amount so received by them, the latter brought this action for its recovery. Judgment was rendered in favor of the former, with costs, from which the plaintiff has appealed.

The sole question presented by this appeal is whether the plaintiff can maintain an action for the recovery of the money so paid to perfect the appeal, and I have been unable, after considerable research, to find any adjudication bearing directly upon the question under consideration.

The cases cited by the appellant, of which Clark v. Pinney, 6 Cow. 297; Sturges v. Allis & Lee, 10 Wend. 355, and Haebler v. Myers, 132 N. Y. 363, are types, merely hold that an action lies to recover money paid on an *execution* issued under a judgment which is afterwards reversed.

Such is not the case here as the sum sought to be recovered was not lost by means of an erroneous judgment. Sherwood v. Travelers' Ins. Co., 12 Daly, 137, 139.

In the last cited case, the plaintiff recovered a judgment against the defendant in a District Court, from which an appeal was taken, and the costs and fees to perfect the appeal were paid to the clerk. The judgment was reversed, with costs, and the defendant thereafter demanded back the money so paid. In default of such return, an application was made to compel the clerk to comply with the demand, and on the argument of the motion it appeared that he had already paid the amount to the plaintiff's attorney. The clerk appealed from the order granting the motion, and the court, in reversing it, said, speaking through Beach, J.: "The appellant, if costs are awarded him on the appeal, may tax, among other items, the costs and fee paid to the justice upon taking the appeal. Code of Civil Procedure, § 3060. The authority to include these costs among the disbursements on appeal seems to contemplate a prior disposition of them by the justice or his clerk. The only one possible is a payment to the successful party in the District Court, as they certainly do not belong to either of those officials,

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and, if to rest on deposit, no necessity existed for such a provision. * * * Neither can these costs fall within section 3058. They are not property lost by means of the erroneous judgment, because not taken from the party under the judgment, but paid as one of the steps needful to perfect his appeal."

The rule laid down in this case was substantially approved in Kenney v. Livery Stable Keepers' Assn., 89 Hun, 190, where the court (p. 192) said: "Upon the argument it was contended that there was no way for the appellant (the present respondent) to recover the costs so paid in case he succeeded on his appeal, but section 3060 of the Code appears to be applicable to such a case, and, under that provision, costs and fees paid to the justice may be included in the disbursements on appeal in case the appellant is awarded costs."

It seems to me that the rule may be fairly deduced from these decisions that costs paid pursuant to section 3047 of the Code of Civil Procedure are not property lost by means of an erroneous judgment, but are such necessary disbursements upon the appeal as may be taxed by the appellant when absolutely awarded to him, or, if granted to abide the event, when he has succeeded ultimately in the action.

For these reasons the judgment should be affirmed, with costs.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment affirmed, with costs.

JACOB KULLA, Appellant, *v.* HIRSH FINER et al., Respondents.

(Supreme Court, Appellate Term, May, 1898.)

False representations — Proof

Where proof of alleged false and fraudulent representations, which procured the plaintiff to part with his property, is made by his own testimony and that of two additional witnesses, it is erroneous for the court to dismiss the complaint upon the ground "that there was no evidence as to false and fraudulent representations."

APPEAL by the plaintiff from a judgment of the Municipal Court of the City of New York, borough of Manhattan, fourth district, dismissing the complaint, with costs.

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The nature of the action and the material facts are stated in the opinion.

Louis Levy, for appellant.

Samuel F. Hyman, for respondents.

GIEGERICH, J. This action was brought to recover the possession of certain goods claimed to have been procured from the plaintiff by the false and fraudulent representations of the defendant Finer, as to property owned by him, and which, it is averred, the defendant Mantel subsequently purchased from his codefendant with notice of the alleged fraudulent character of the transaction.

The defendant Mantel alone appeared and defended the action.

When the plaintiff rested said defendant moved for a dismissal of the complaint upon the ground "that there was no evidence as to false and fraudulent representations," which application was granted, and the plaintiff has brought this appeal.

For the purposes of a determination upon such a motion the testimony of the plaintiff should have been assumed to be true, and he should have been given the benefit of all legitimate inferences therefrom in his favor. There was some evidence of fraud introduced upon the trial, which viewed in its most favorable light was susceptible of the inference that plaintiff parted with the possession of the merchandise upon the representation made by defendant Finer to him, that he had bought two wagons and two horses worth about $400; that such statements were false and so known to be by the said defendant when made; that they were relied upon by the plaintiff, who would not have delivered the goods but for such representation; that upon discovering the fraud plaintiff rescinded the contract of sale, and demanded the return of the property; and that the defendant Mantel bought the same with notice of such alleged fraud.

These facts were established not alone by the plaintiff's own testimony, but by that of two additional witnesses, and we fail to perceive upon what theory they were ignored.

It is argued by the said defendant that the justice discredited the plaintiff's entire testimony. This ruling, however, as we have seen, was not placed upon that ground. Moreover the plaintiff was corroborated by two witnesses, one of whom was not connected in business with him.

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The defendant further contends that the alleged false representations were made subsequent to the sale and delivery of the goods, but the record shows the contrary.

It follows from these views, that the dismissal of the complaint was error, and that the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

JOHN KRESS, Appellant, *v.* CHRISTIAN WOEHRLE, Respondent.

(Supreme Court, Appellate Term, May, 1898.)

Pleading where a complaint charges fraud, there can be no recovery on contract — Proof of fraud.

Where the complaint, in an action to recover moneys, alleges them to have been obtained from the plaintiff by the defendant through fraudulent representations, it is the duty of the court, upon finding that no fraud has been committed, to dismiss the complaint; and it has no power to render a judgment in favor of the plaintiff for the amount claimed as "for moneys loaned."

An allegation of fraud in contracting a liability is not sustained by mere proof of a contract and its breach.

APPEAL by the plaintiff from a judgment of the Municipal Court, borough of Manhattan, seventh district, rendered in his favor "for moneys loaned. No fraud shown," against the defendant, by the acting justice thereof, without a jury.

The nature of the action and the material facts are stated in the opinion.

M. S. Adler, for appellant.

Julius Henry Cohen, for respondent.

GIEGERICH, J. The plaintiff sued for the recovery of moneys alleged to have been obtained from him by the defendant by fraudulent representations. The justice decided that no fraud was shown and gave judgment in favor of plaintiff for the amount

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claimed "for moneys loaned." This was error. If the justice did not believe, as is obvious, that a fraud had been committed, it was his duty to dismiss the complaint, or, upon a conflict of the evidence, to render a judgment in favor of the defendant, and not give judgment for the plaintiff for the sum obtained *ex contractu.*

The form of the plaintiff's action being *ex delicto*, it was incumbent upon him to establish the fact that the defendant was guilty of fraud in contracting or incurring the liability, and his allegations were not sustained by the mere proof of a contract and its breach. Walter v. Bennett, 16 N. Y. 250; Ross v. Mather, 51 id. 108; Truesdell v. Bourke, 145 id. 612; Kley v. Healy, 9 Misc. Rep. 93; Smith v. Smith, 4 App. Div. 227; Starr v. Silverman, 23 Misc. Rep. 151; 50 N. Y. Supp. 657; Wright v. Duffie, 23 Misc. Rep. 338 and citations.

The judgment cannot stand in any event, because it is not *secundum allegata et probata.* Fuld v. Kahn, 4 Misc. Rep. 600; Owens v. Flynn, 7 id. 171; Kley v. Healy, *supra.*

The judgment should, therefore, be reversed and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

OLGA SCHWARTZ, Respondent, *v.* SIMON SCHENDEL, Appellant.

(Supreme Court, Appellate Term, May, 1898.)

Appeal to Appellate Term — Order opening default — Costs payable on appeal from order.

A defendant has a right to appeal from an order of a justice of a District, or Municipal, Court of the City of New York imposing terms upon opening his default and need only pay, as a condition of that right, the motion costs awarded by the order. He cannot be compelled to pay costs theretofore awarded against him in the action and whose payment formed a part of the conditions upon which his default was opened.

MOTION to dismiss appeal.

Abraham B. Schleimer, for motion.

Benno Loewy, opposed.

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Per Curiam. This is a motion to dismiss an appeal taken from an order made by the justice below opening the defendant's default. The order in question was made upon certain conditions, among others that the defendant pay to the plaintiff's attorney the sum of $17.50, the amount of costs awarded by the judgment which was opened; the sum of $16.25, the amount actually disbursed by the plaintiff in procuring the attendance of her witnesses upon several dates when the cause had appeared upon the calendar of the court for trial; and also that he should pay to the attorney for the plaintiff the sum of $10 costs of the motion. The order is appealed from by the defendant for the purpose of obtaining a review of the right of the justice to impose the conditions upon which the default was opened.

The plaintiff contends that the defendant has not perfected his appeal because of his failure to pay the $17.50 and the $16.25, the payment of which formed part of the conditions specified in the order appealed from, and relies upon section 3047 of the Code of Civil Procedure, which requires the payment, at the time of serving his notice of appeal, by an appellant, to the person to whom it is delivered, of the costs of the action included in the judgment and the sum of $2 as the fee of the justice for making the return.

Chapter 748 of the Laws of 1896 sanctions an appeal from such an order, and declares that it "shall lie as from a judgment in said court." It has been held that such an appeal is subject to the provisions of section 3047 of the Code of Civil Procedure. Szerlip v. Bair, 20 Misc. Rep. 588. This, of course, means so far as in the nature of things that section may be applied. We are of the opinion that, as applied to such an order, the section must be construed as meaning the costs awarded upon the motion and included in the order, and that it certainly does not require, as contended in this case, the payment of the costs which had been theretofore awarded in the action, the payment of which formed part of the conditions upon which the relief sought for was granted. The only costs that were awarded by the order were the motion costs, and these are the only costs which the defendant was called upon to pay in order to perfect his appeal.

Motion denied, with $10 costs.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Motion denied, with $10 costs.

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ISAAC POPKIN, Respondent, *v.* HARRIS FRIEDLANDER, Appellant.

ISAAC POPKIN, Respondent, *v.* JACOB SUBIN, Appellant.

(Supreme Court, Appellate Term, May, 1898.)

Municipal Court — Order opening default must state the grounds

An order of a justice of a District, or Municipal Court of the City of New York opening a default, is fatally defective unless it recites and contains the grounds for the order.

APPEAL from orders of the Municipal Court of the City of New York for the fourth judicial district, borough of Manhattan, opening the plaintiff's default.

Moses Feltenstein, for appellants.

I. B. Ripinsky, for respondent.

Per Curiam. We are not inclined to interfere with the decision of the justice below opening the defaults, and if a review was asked for solely on the merits, we should affirm the orders. The point, however, is made that the orders appealed from do not comply with the requirements of chapter 748 of the Laws of 1896, amending section 1367 of the Consolidation Act, which, among other things, provides that the order of a justice on opening a default "shall recite and contain the grounds for the order." The objection is well taken, as the justice has utterly failed to comply with this requirement. This is fatal to the orders, and calls for a reversal. Colwell v. Devlin, 20 Misc. Rep. 355.

Orders reversed, with costs, and causes remitted to Municipal Court of the City of New York, borough of Manhattan, fourth district, for the entry of proper orders upon notice.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Orders reversed, with costs, and causes remitted to Municipal Court for entry of proper orders on notice.

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OLGA SCHWARTZ, Respondent, *v.* SIMON SCHENDEL, Appellant.

(Supreme Court, Appellate Term, May, 1898.)

Appeal to Appellate Term — Orders appealable.

After a justice of a District, or Municipal Court of the City of New York had opened the default of a defendant upon terms, he made a subsequent order vacating his former order and, in effect, denying the motion on the ground that the terms upon which his former order had been made had not been complied with. The defendant appealed to the Appellate Term.

Held, that the appeal must be dismissed, as the statute did not authorize such an appeal, but only one from an order opening a default.

MOTION to dismiss appeal.

Abraham B. Schleimer, for motion.

Benno Loewy, opposed.

Per Curiam. It appears that after making the order opening the defendant's default upon conditions, the justice below made a subsequent order, which is the one appealed from, vacating his former order and in effect denying the motion on the ground that the conditions upon which his former order had been made had not been complied with. This motion is now made to dismiss the appeal on the ground that an appeal will not lie from such an order. We think the objection is well taken. Under chapter 748 of the Laws of 1896, an appeal lies only from an order opening a default. The right to appeal to this court from the determinations of the District Courts, now the Municipal Courts of the City of New York, rests upon statute; and as there is no statutory authority for such an appeal as has been taken here, this court has no jurisdiction to entertain it, and the motion to dismiss must, therefore, be granted, with $10 costs.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Motion granted, with $10 costs.

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HARRIET W. BLISS, Respondent, *v.* GEORGE H. CORYELL, Appellant.

(Supreme Court, Appellate Term, May, 1898.)

Appeal to Appellate Term — Review of final order in summary proceedings.

Where a review is sought of a final order in summary proceedings, the return should show all that took place before the justice prior to his signing the order, but matters which transpired thereafter cannot be considered nor be made a part of the return.

MOTION to amend return.

Dowd & O'Brien, for appellant.

W. O. Campbell, for respondent.

Per Curiam. We think that the return in this case should be amended so as to set forth all that took place before the justice prior to the signing of the final order. We are satisfied that we have nothing to do with anything which took place in the matter thereafter, in view of the fact that the only appeal which can be taken to this court in summary proceedings is from such order. Where a review of the final order is sought, matters which transpired after it was made cannot, therefore, be relevant to the question of the propriety of such order, which must stand or fall only upon the proceedings which were terminated by its entry.

The motion is, therefore, granted to the extent above specified.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Motion granted to extent above specified.

THE PEOPLE ex rel. ADELBERT LANGWORTHY, Relator, *v.* JOSEPH E. HAZARD, Sheriff of Cattaraugus County, Respondent.

(Supreme Court, Erie Special Term, May, 1898.)

Liquor Tax Law — Imprisonment cannot be directed as an alternative for the nonpayment of a fine

A person who has been convicted under the Liquor Tax Law cannot be imprisoned as a condition for the nonpayment of a fine imposed upon him by the court, and when confined under a sentence of such a tenor is entitled to be discharged from imprisonment.

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Proceedings by *habeas corpus* to discharge the defendant from the custody of the sheriff of Cattaraugus county.

D. E. Powell (W. G. Laidlaw, of counsel), for relator.

Joseph H. Congdon, district attorney, for respondent.

Titus, J. This is a proceeding, by *habeas corpus*, to discharge the defendant from the custody of the sheriff of Cattaraugus county.

On the 14th day of March, last, in the County Court of Cattaraugus county, Adelbert Langworthy was convicted of the crime of selling liquor in quantities less than five gallons at a time, without having paid the tax and posted the liquor tax certificate. On the 21st day of March, the court sentenced the defendant to pay a fine of $200, and to stand committed to the county jail until paid, not to exceed one day for each dollar imposed as a fine.

The only question raised on the return of the writ was, whether the court had the power, under the law, to impose a fine, and imprison the defendant for failure to pay the same, under the provisions of the Penal Code.

It does not seem necessary to enter into a discussion of this question. The same question was before the Appellate Division of the fourth department, in People ex rel. Bedell v. Kinney, reported in 24 App. Div. at page 309. In that case the writ was dismissed, as having been prematurely taken, but Judge Ward, in the opinion (although the court did not pass upon this question), held that such a sentence was contrary to the provisions of the Liquor Tax Law; that it conferred no power upon the court to impose imprisonment as a penalty for not paying the fine.

In the case of People v. Stock, 26 App. Div. 564, recently decided by the Appellate Division in the second department, the court unanimously held, in a case where the facts are parallel in all particulars to the case under consideration, that the provisions of the Criminal Code providing that a judgment which imposes a fine may also direct the criminal to be imprisoned until the fine is paid, for a term not exceeding one day for each dollar of the fine, are not applicable to a conviction under the Liquor Tax Law; that, as the latter statute covers the whole subject, prescribing the punishment and the manner in which the fine shall be collected, the penalty imposed must be in accordance with that statute, and that in such a case, where the defendant was convicted and fined, and, in the

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alternative, ordered sent to the penitentiary not exceeding one day for each dollar imposed as a fine, was void, to the extent of the imprisonment, and that the defendant was entitled to his discharge.

Under any circumstances I should feel bound to follow these decisions, being parallel to the case under consideration, if I had no personal opinion upon the question, but I am strongly of the opinion that these cases express the true rule of law upon this question, and that a defendant convicted under this statute cannot be imprisoned as a condition for the nonpayment of a fine imposed by the court.

It follows, therefore, that the relator must be discharged from his imprisonment, and it is ordered accordingly.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* WILLIAM E. HALL, Defendant.*

(Supreme Court, Erie Special Term, January, 1898.)

Crimes — Where the public is excluded, there is reasonable doubt whether the accused has had a "public trial"— Applications for certificate of reasonable doubt.

Upon the trial of an indictment for extortion, a felony, the court, a county judge, "on account of the character of the testimony which it is reasonable to expect from this case," directed and compelled the exclusion from the court-room during the trial of all persons except the parties, their attorneys and the witnesses called. Upon an exception taken to this direction, the court said that, if the defendant had any special friend whom he wished to have sit beside him during the trial, the friend might do so, and added, "but the disgusting and revolting character of the testimony which, was brought out on the last trial is such that the public good requires the exclusion of all spectators during the course of the trial."

Held, that as the prosecution was criminal and, therefore, one where under the sixth amendment of the Constitution of the United States "the accused shall enjoy the right to a speedy and public trial by an impartial jury" (Code of Crim. Pro., §§ 5 and 8), the question whether the defendant had not been deprived of his undoubted right to a

* Received too late for insertion in proper place.— [Rep.

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"public trial" was so doubtful as to justify a justice of the Supreme Court in granting, under section 527 of the Code of Civil Procedure, a certificate that there was reasonable doubt whether the judgment should stand. That the practice, of making such an application to a justice of the Supreme Court out of the district where the trial was had, was one which should be discouraged.

APPLICATION by defendant for a certificate of reasonable doubt.

S. J. Warren, assistant district attorney, for People.

George M. Williams, for defendant.

TITUS, J. This is an application by the defendant for a certificate that there is reasonable doubt whether the judgment should stand, as provided in section 527 of the Code of Criminal Procedure.

When the application was made to me, without very much consideration I consented to hear it, which I should not have done had I given the question any serious thought. Ordinarily applications of this kind should be made to a justice of the Supreme Court of the district where the action is pending, and attorneys should not be encouraged to go outside the district to get orders of this character, when they can be quite as well or better considered by a justice of the locality where the proceeding is pending.

Several questions are raised by the counsel for the defendant which he claims entitle him to a certificate of reasonable doubt, but I have considered but one question as being of sufficient importance to warrant me in acting in this case.

The defendant was indicted, with others, for the crime of extortion, which, under the provisions of the Penal Code, is a felony. On the trial before the County Court of Monroe county, after the jury was selected, the judge made the following announcement:

"The court will take this occasion to say that, on account of the character of the testimony which it is reasonable to expect from this case, the persons who have no business before the court, or any connection with this case, will be excluded from the court-room. I make no exceptions to this rule. The witnesses who are called here for this case, and the parties and their attorneys are the only ones who will remain.

"Mr. Williams: Does that include the representatives of the press?

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"The Court: I see no reason why the accounts of this case should be published.

"Mr. Williams: The defendant excepts to the order of the court, and the defendant asks to be tried as prescribed by the Constitution, the Bill of Rights and the Code, which says that the trial shall be conducted publicly, and the defendant asks that any citizen who desires to attend the trial shall do so, so long as there is room for him in the courtroom.

"The Court: If your client has some special friend that he wishes to have sit by him during this trial, I have no objection to such a person remaining in the courtroom; but the disgusting and revolting character of the testimony which was brought out on the last trial is such that the public good requires the exclusion of all spectators during the course of the trial; and the court takes the responsibility of keeping out the crowd. If there is anyone you wish to have here as company for your client, that person may remain.

"Mr. Williams: I quite agree with your honor as to the crowd; but as to the press, it seems to me they should be admitted. I know of no provision which gives the court authority to make the order.

"The Court: I will assume the responsibility for the order; the sheriff will see that it is executed. Exception taken by the defendant.

"The Court: I hope there will be no misunderstanding about the intention of the court, or the right of the defendant to a public trial. If there is any person, any particular individual, you desire to have in the courtroom, for the protection of your client's right, the court has no intention of excluding any such person, but the indiscriminate multitude.

Mr. Williams: I think I understand the order of the court. The defendant asks to be tried as prescribed by the Constitution and the various acts of the Legislature, and publicly, and that no evidence be taken except the public be admitted and the representatives of the press be admitted so long as there is room."

This presents the question whether the defendant had a public trial, and whether the court erred in excluding the general public pending the trial.

It appears from the affidavits presented to me that the order was enforced, and that all persons, including citizens, attorneys and

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others, were excluded from the court, and were not permitted to enter the courtroom and listen to the trial of the indictment.

As I understand the provisions of section 527 of the Criminal Code, it is not necessary for me, in determining whether the defendant is entitled to a certificate, to decide that error was committed by the court, but only the question, does this order, made by the county judge, raise a reasonable doubt as to his authority in making it, and, if it does, then it becomes my duty to grant this certificate.

So far as I have been able to learn, no court or judge in this country has ever intimated that a defendant accused of crime is not entitled to a public trial, and it is not pretended in this case that such is the law, but that the order of the court, excluding the public during its sittings, was not a deprivation of the defendant's right to a public trial. Indeed, such a position would be untenable, and could not for a moment be sustained by any court, because it is one of the fundamental principles of this country, and embodied in the Constitution of the United States, that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." (Constitution of the United States, 6th Amendment.)

It seems to me that this is an important personal right of one accused of crime; indeed, in most of the Constitutions of the states of this country, this, or a similar provision, has been enacted, showing the importance which the people of the country attach to the personal rights of parties accused of crime, and so much so as to make it a part of the fundamental law.

By section 8 of the Code of Criminal Procedure it is provided: "In a criminal action the defendant is entitled to a speedy and public trial," and, by section 5 of the Code of Civil Procedure, that "the sittings of court shall be public, and any citizen may freely attend the same;" so that, if the defendant did not have a public trial, it was clearly a violation of his right to exclude the public. This being a criminal action, it is not competent for a person charged with crime to waive any of his constitutional rights during such a trial. In one case it was held that a defendant charged with a felony could not consent to be tried by a jury of eleven men, the court holding that he could not waive a right to be tried by the mode provided by the Constitution and laws of the state. Cancemi v. People, 18 N. Y. 128.

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If this was a civil case, a different question might arise. The defendant then might waive his legal and constitutional rights, and submit his case to a tribunal not constituted according to law, and, in fact, to one unknown to the law.

There is no case that I can find where the courts of this state have passed upon this question, and I assume that if this was not a public trial, then the court was in error.

Section 5 of the Code of Civil Procedure provides, that "in cases of divorce, on account of adultery, seduction, abortion, rape, assault with intent to commit rape, criminal conversation, and bastardy, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court." The defendant was not charged with any of these offenses, and it seems to me questionable whether the court can extend its provisions to cases not enumerated in this section. It seems to be the only authority given by the statute under which the court may act, and even here the order made by the county judge was broader than the language of this section of the Code, which permits the exclusion "of all persons who are not directly interested therein, excepting jurors, witnesses and officers of the court."

In the only reported case in this state (People ex rel. Kenney v. Cornell, 6 Misc. Rep. 568; 27 N. Y. Supp. 895), Justice Cullen held that where the magistrate entertains an application for a criminal warrant, he does not hold a court within the meaning of section 5 of the Code of Civil Procedure, and he may, therefore, examine the witnesses on such application in private, but he says: "If, however, it is within the spirit of the statute, I concede it should be liberally construed." In Marshall v. Rochester Printing Company, 35 Hun, 667, the General Term affirmed a judgment in an action for libel, in which Justice Rumsey, during the reading of a letter, excluded all persons except jurors, witnesses and officers of the court. This was a civil action, and no exception was taken to the ruling of the judge, and the exclusion being for a limited time and temporary purpose, the case does not seem to be authority for the ruling made by the county judge.

A number of cases have been passed upon by the courts in the different states, none of which go to the extent of holding that the court has the right to exclude the public from its sittings, for the reasons stated for making the order in this case.

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People v. Murray, 89 Mich. 276, arose under a provision of the Constitution of that state, which provides, that "in every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury." The trial judge excluded from the courtroom the general public, and the court held, in an exhaustive opinion, reviewing all of the authorities in this country, that the defendant did not have a public trial, and that the court below had no power to exclude the public from attending the sittings of the court, and reversed the conviction, although the judge in that case, in his return, stated that the trial was a public trial, and that persons were excluded solely on the ground that the evidence was of an immoral character, which the public should not hear.

In 1893, the legislature of Michigan passed an act providing "that whenever it shall appear upon the trial of any case that evidence of licentious, lascivious, degrading or peculiarly immoral acts or conduct will probably be given, the judge presiding at such trial may, in his discretion, require and cause every person, except those necessarily in attendance thereon, to retire from the courtroom."

People v. Yeager, 71 N. W. Repr. 491, arose under this provision of the law. In that case the trial judge directed that the public should be kept out, and enforced the order, and the Supreme Court held that the act was unconstitutional, that the trial judge was unwarranted in excluding the public, and reversed the conviction.

In State v. Brooks, 92 Mo. 542, the court held that the right to a public trial by the defendant in a criminal action was not violated when, after admitting the public until the seats in the courtroom were full, the court excluded others from entering.

In Grimmett v. State, 22 Tex. App. 36, it was held that where, during the examination of a witness, the court excluded persons from the room for boisterous and disorderly conduct, it was not a violation of the defendant's right to a public trial.

In People v. Kerrigan, 75 Cal. 222, during the trial for assault with intent to commit murder, the defendant became greatly excited, and used profane and obscene language to the court and to its officers, which created a commotion among the spectators, and seriously interrupted the trial, and the court made an order excluding the spectators from the courtroom. This was held not to be a violation of the defendant's rights, but necessary to protect the court from indignity and indecorum.

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In Matter of Shortridge, 99 Cal. 531, which was an action for divorce, the court says: "The assumption that the object of the statute was to protect the public from the contaminating influence of prurient revelations often made in actions of divorce, seduction, and criminal conversation is unwarranted. It was to secure decorum in the conduct of trials involving the relations of the sexes, and to protect witnesses of refined sensibilities from the ordeal which they might otherwise have to pass through in giving testimony of a delicate or filthy nature in the presence of a crowd of vulgar or curious spectators. * * * But with the moral aspect of the case we have nothing to do. The courts are not conservators of public morals. Rules affecting the conduct and morals of the community must proceed from the legislative department."

In Cooley's Constitutional Limitations, page 312, it is said: "The requirement of a public trial is for the benefit of the accused, that the public may see that he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions."

It will thus be seen that in no case has the court assumed to exclude the general public from the courtroom on the trial of a criminal action, except for a limited time — to protect the dignity of the court, or under some local statute giving the court express authority so to do; and in these, as in the Yeager, case, the court holds that such statutory authority is unconstitutional, and infringes upon the right of the accused to a public trial.

In considering this question I have not assumed to decide whether or not the defendant was deprived of his undoubted right to a public trial, but to ascertain if there is a reasonable doubt whether the judgment should stand, and an examination of the authorities leads my mind to the conclusion that there is in this case such a doubt. As I understand it, it is my duty, under section 527 of the Criminal Code, to grant the certificate asked for, and it seems to me that the serious and important character of the question here raised is sufficient to warrant the action which I have taken, and I, therefore, conclude that the defendant is entitled to the certificate, as provided by the Code.

Ordered accordingly.

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JOSEPH TALBOT, Respondent, *v.* THE TIPPERARY MEN NATIONAL, SOCIAL & BENEVOLENT ASSOCIATION, Appellant.

(Supreme Court, Kings Special Term, May, 1898.)

1. **Benefit associations — Amendment of constitution.**

Where the constitution of a benefit membership corporation provides that it may be amended at a quarterly meeting by a two-thirds vote of the members present, and upon two weeks' previous notice in writing given at a meeting, a member is not entitled to a personal notice of the proposed amendment and is bound by an amendment which has been passed in the manner prescribed by the constitution.

2. **Same — A provision reserving to the association the right to expend a wife's burial benefit.**

Where such a constitution, as amended, provides that "on the death of a wife of a member" there should be paid towards her burial expenses a sum fixed, the association reserving, however, the right to expend the money itself, or, in the alternative "hand it over for that purpose to the next of kindred," it cannot, where it has not been informed of the death of the wife until after her funeral, be held liable for the stipulated payment, as it has been afforded no opportunity to exercise its option of expending the money by its own hands.

3. **Same — Death of a second wife.**

Under such phraseology, the fact that the member has received a burial payment upon the death of his first wife does not preclude him from claiming a similar payment upon the death of his second wife.

4. **Same — Husband as "next of kindred."**

While a husband is not technically "next of kin" to his wife, he is sufficiently of her "next of kindred" to be entitled to become the recipient from the association of a burial payment upon her death.

APPEAL from a judgment in favor of plaintiff, rendered in the Justice's Court of the Borough of Brooklyn.

Alfred Steckler, for appellant.

John P. Donnelly, for respondent.

JOHNSON, J. This case comes before this court on an appeal from a judgment in favor of the plaintiff for $75 and costs entered in the Justice's Court of the Borough of Brooklyn.

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The defendant is a corporation, organized for social purposes and purposes of mutual benevolence: I assume it is of the character known as a membership corporation. The plaintiff became a member in 1893. At that time the association had a constitution which provided for certain benefits or payments in case of death, among others, a payment of $75 towards defraying the expenses of burial of a member, or of the death of the wife of one of the members. Some time after the plaintiff became a member, it is claimed, this constitution was amended so as to modify the provision in relation to the death of the wife of a member.

The first question in the case is, which constitution is now in force, the earlier or the amended one? The original constitution provided for amendments at a quarterly meeting of the association, by a two-thirds vote of all the members present, and on at least two weeks' previous notice in writing, given at a meeting of the association. Officers of the association were called, who testified that the constitution had been amended some years before the death of the plaintiff's wife. The plaintiff, however, objected to the admission of the amended constitution; his objection seeming to be that he had no notice of the proposed amendment.

I hold it is very clear that it was not necessary that personal notice should be given; the scheme for amendment only requiring a notice given in a quarterly meeting of the association. Hence, I hold that the case is to be determined under the amended constitution.

The provision contained in the amended constitution for a benefit in case of the death of a wife is as follows:

"Section 1. On the death of any member not disqualified by the Constitution and By-Laws the sum one hundred dollars shall be paid toward his burial expenses, the association reserving the right to expend the money themselves towards the burial of its members, or hand it over for that purpose to the next of kindred.

"Section 2. On the death of a wife of a member not disqualified by the Constitution and By-Laws, the sum of fifty dollars shall be paid, and the association's right reserved as in the preceding section.

"Section 3. No member shall be entitled to either of the benefits specified in the preceding sections until he shall be six months a member and continuously in good standing. Nor shall he be entitled to receive any burial benefit for his wife until six months have elapsed from date of marriage, if single when becoming a member."

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It is conceded that the association had no notice of the death of the plaintiff's wife until after her funeral and some two weeks after her death. The association had expressly reserved the right *to expend the money themselves toward the burial of a deceased member or the wife of a deceased member.* As they had no knowledge of the death of the first wife until after the funeral, and consequently had no opportunity to exercise that option, the question is: — Can they now be held for the seventy-five dollars? It should be noticed that this is a social and benevolent association, the purpose obviously being to bring together for better acquaintance and mutual aid men of common descent and common pride or love of ancestry. It was not an insurance company originally or principally; and the benefit comes not as an "insurance," but rather as a means whereby the kindly and benevolent offices of the society would follow their deceased members and their wives to their final resting place. Hence, the reservation of this right, for the association itself to expend the money, was a matter of substance, comporting with the character and purposes of the association.

So construing that provision, it follows that the plaintiff has no right to recover, and the judgment must be reversed.

I deem it fair, however, to consider the other objections and questions which have been presented. It is shown that in the early years of the plaintiff's membership his wife died, and the association paid him the regular benefit, and that the wife on account of whose death he now claims was a second wife. The point is made, that having paid a benefit for the death of the first wife, there is no obligation to pay on account of the death of a second wife. I do not think that objection is good. There is no reason why a member in good standing should not have the benefit on the death of a second wife as much as on the death of the first.

The provision is that the payments shall be made to the "*next of kindred,*" and it is urged that the husband is not the next of kindred to the wife. The counsel for the association cites a large number of authorities clearly establishing that the husband and wife are not "next of kin" to each other. But the phrase "next of kin" is a phrase of legal definition, which is used and applied to indicate a particular class of relatives. In other words, it is a technical term, not ordinarily used in common speech. Hence, whenever it is used, it is to be presumed that it is used in its technical meaning. But the term "next of kindred" is quite different; it is not a technical term, used as a legal definition. Hence I think

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the cases cited by counsel for the appellant do not apply. The question then is, what is the meaning of "next of kindred" as used here? We must consider it in connection with the purposes of the provision. As has been stated, the association was formed for purposes mutually helpful, and these death benefits were given rather as a benevolence and as a continuation of the help given in case of need during life. In case of the death of the husband, the wife, and in case of the death of the wife, the husband, has the first right to administer. In common speech and common understanding, the widow is next to the deceased husband, and the widower is next to the deceased wife.

Hence I think that it would be a harmful mistake to consider that the husband or wife, as the case may be, is not the party entitled to draw this benefit in a proper case.

Judgment reversed, new trial ordered.

EDWIN E. DICKINSON, as Receiver of the Granite State Provident Association, Plaintiff, *v.* THE CONTINENTAL TRUST COMPANY et al., Defendants.

(Supreme Court, New York Special Term, May, 1898.)

Corporations — A mutual company cannot issue stock guaranteed to pay a fixed dividend — Rescission — When its receiver cannot plead ultra vires — Restoration.

A foreign building and loan association, empowered to carry on business solely upon the mutual plan, with members sharing ratably in the surplus and profits, made an agreement with the defendant, a domestic trust company, whereby it was to receive moneys paid for "trustee stock" issued by the association, declared to be full paid, nonassessable, guaranteed to pay 6 per cent. per annum and also declared not participating in further profits or dividends. The trust company, upon its part, agreed to transfer moneys, received from the stock, to the association upon receiving from it sufficient mortgages to secure the holders of the stock and further agreed to certify, upon the certificates of stock, that it held such mortgages as security for them and for the performance of the conditions of payment entered into by the association, which contract conditions were also to be expressed upon each certificate. At a time when the association was insolvent, two other defendants, not then members of the association,

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purchased certificates of "trustee stock," which are still outstanding. A temporary receiver of the association, appointed after its insolvency, brought the present action to compel the trust company to surrender certain mortgages which it held for the benefit of the other defendants. The receiver did not offer to restore.

Held, that the action could not be maintained.

That while the association, as mutual in its character, had no authority to issue stock which was absolutely guaranteed to pay 6 per cent. and which was protected from the risks of the business, such issue was not against public policy but at most was *ultra vires* and that the receiver, who had not offered to restore, could not plead *ultra vires* in order to defraud third persons who had, in effect, purchased an interest in the mortgages held by the trust company, in reliance upon its certificate that it held them as security for the stock.

ACTION in equity by the receiver of an insolvent corporation to compel the surrender to him as receiver of certain mortgages held by a trust company.

Lexow, Mackeller & Wells, for plaintiff.

Jay & Chandler, for defendant Continental Trust Company.

John Desmond, for defendant Ashley.

KELLOGG, J. The plaintiff, as receiver of the insolvent corporation above named, and which was created by a special charter from the legislature of the state of New Hampshire to do an insurance and building loan business on the mutual plan, brings this action in equity to compel the surrender to the receiver of certain mortgages held by the Continental Trust Company and so held as security and for the benefit of the defendants Roscoe B. Ashley and Perry R. Smith.

There is no disputed fact in the case. It is conceded that the Granite State Provident Association was empowered by its charter in language following, viz.: "And shall be capable of acquiring by purchase, lease, mortgage, or otherwise, and of holding absolutely and conditionally, lands, real estate and personal property, and of selling, alienating, transferring, mortgaging, leasing, conveying or in any way disposing of the same, and otherwise acting as a building association, enabling members to purchase or build their own houses." The charter further provides that the corporation "shall carry on business solely on the mutual plan," and that the holders of "certificates of shares who shall have paid all due premiums or

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calls thereon * * * shall be respectively members thereof," and further provides for a ratable distribution among its members of all surplus and profits. These provisions of the charter seem to be all that have any bearing on the questions here involved. The charter contemplates a business to be done on the mutual plan. That is, the loans are to be made to members of the association, and the members are to share ratably in the surplus and profits. Any method might have been adopted for the working out of the plan so long as the idea of mutuality was preserved. The full payment of the face value of a certificate when issued is not repugnant to such a plan (21 How. [U. S.] 35); but I think any guarantee of the corporation to pay to any member absolutely a certain annual sum out of the general fund as his dividend or interest upon capital invested in the stock of the association would be repugnant to a "mutual plan," and, unless intended as a loan of money, the payment of such a dividend or interest could not be enforced. An unconditional agreement — one not based on the contingency of surplus or profits — to pay a sum certain at stated periods as dividends upon stock is not compatible with the idea of equality or mutuality. In discussing this question, Earl, J. (People ex rel. Fairchild v. Preston, 140 N. Y. 553), said that the idea of equality and mutuality was not defeated where the certificate provides that "upon prepaid stock there shall be paid at the time of subscription, dues to the amount of sixty dollars, and the holder thereof shall be entitled to receive *out of the profits apportioned thereto* semi-annual dividends in cash up to the rate of 6 per cent. per annum. The profits apportioned to such stock over and above such dividends, shall be credited thereto, and be payable with the stock at its maturity," but it will be observed here that there is no guarantee of 6 or any other per cent,— it is wholly limited to the actual profits properly apportioned to this class of stock, and nowhere in his discussion does Judge Earl intimate that business strictly upon the mutual plan would authorize the issuance of stock with an unconditional guarantee of 6 per cent. per annum.

The conclusion, it seems to me, is unavoidable, that the charter powers of the Granite State Provident Association were restricted to the issuance of stock and to the doing of business upon the mutual plan, and that it was not authorized to issue stock, to which was attached an unconditional guarantee of 6 per cent. annually to the holder.

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It is undisputed that this association on May 5, 1894, first issued a certificate known as fully paid "Trustee Stock" for $5,000 to Percival Stewart. This certificate was returned May 13, 1895, and Mr. Stewart received the $5,000 and interest. The next certificate was issued also to Mr. Stewart on February 13, 1895, for $10,000 and was returned May 13, 1895, and the money repaid. The next certificates were issued to defendant Ashley, of Rochester, N. Y., on May 24, 1895, aggregating $3,045, and all are still outstanding. The next was to defendant Smith, of Constableville, N. Y., on December 17, 1895, for $500, and is still outstanding. This constitutes all the "business" done by this association in this class of certificates. The order appointing a temporary receiver herein is dated March 28, 1896, and it may easily be assumed that the association was in fact insolvent when these certificates were issued, and the money of these two defendants was paid to it. On November 1, 1894, the association made an agreement with defendant the Continental Trust Company, whereby the Trust Company was to receive the money which might be paid for stock of this class, and turn it over to the association, on receipt of sufficient mortgages to secure the holder of the stock, and the certificates of stock were to bear upon the back or face the certificate of the Trust Company — that it held such mortgages as security for the certificates so issued, and for performance of the conditions of payment entered into by the association, which contract conditions were also to be expressed upon such certificate. Upon the back of the certificates issued to these defendants, among other things, appears as follows: "This certificate is fully paid and nonassessable, and the holder shall receive a dividend of six per cent. per annum, payable semi-annually on the first days of January and July; and in consideration of the additional security given by placing the money paid upon this certificate, and the securities purchased therewith in the custody of the Continental Trust Company of New York, the holder waives forever any right to additional profits or dividends."

Then come provisions for redemption of the certificate by the association by payment in full, etc., and the holder is given the right to demand payment in full after ten years. This discloses a special contract, quite outside the ordinary contract between the association and the other members, and has more the appearance of a loan of money upon security than otherwise. It certainly is not capital taking the risks and chances of the business. The defendants, Ashley and Smith, parted with their money in good faith

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under this contract, and upon these conditions it was paid to the Continental Trust Company. The association received it from the Continental Trust Company, upon turning over the mortgages now sought to be recovered, and the money found its way into the association's general fund for the benefit of all the other members. These defendants were not members of the association before they parted with their money, and did not rely upon any promise of the association to pay either principal or interest; they had the assurance of the Continental Trust Company and the mortgages in the possession of that company as security; except for this assurance and this security for its return, it is not at all likely the association would have become possessed of the money. All this may have been *ultra vires* so far as the association was concerned, and I think it was in so far as it can be viewed as a method of creating preferred memberships in the association, but it is not a contract against public policy in the sense that it was *malum in se — contra bonos mores;* and, regarded as a method of borrowing money, cannot be considered as *malum prohibitum;* the charter at most only prohibiting the doing "business" on any other than the mutual plan. In this contract the public has no interest; no one could be affected injuriously by it except the other members of the association, and they, in fact, became as members of the association the owners of the money paid over by these defendants. The receiver here represents this association and stands in no better position, and can urge no better equities in this action than could the association itself. The receiver without restoring, or offering to restore, to these defendants the money obtained from them through this device, now asks a court of equity to take from the defendants these mortgages which represent their money. When did a court of equity knowingly give active assistance to a suitor confessedly pursuing innocent parties for the purpose of robbery? The court has sometimes refused to aid the innocent in the enforcement of tainted contracts, or contracts void from public policy, but it has uniformly refused to assist the wrongdoer as in the *Utica Insurance* cases. The maxim, "Who asks equity should do equity," cannot be ignored by the plaintiff here. The plea of *ultra vires* is frequently taken on as a shield and a defense, but rarely does a plaintiff assert his unlawful act as a cause of action.

I am convinced that the plaintiff is not now in a position to maintain this action and will not be until he shall have restored, or offered to restore, the money obtained from defendants, Ashley and

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Smith; that the *ultra vires* complained of gives plaintiff no standing in this court to assail these defendants or the holder of the mortgages. I am also convinced that the *ultra vires* complained of, on the part of the association, would not avail as a successful defense in an action brought by the defendants, Ashley and Smith, at the proper time, to enforce payment of their claims through these mortgages.

It was declared in Bissell v. Michigan R. Co., 22 N. Y. 258, that corporations like natural persons have power and capacity to do wrong, and may in their contracts and dealings break over the restraints imposed upon them by their charters, but when they do so their exemption from liability cannot be claimed on the sole ground that they have no attributes or faculties which render it possible for them to thus act; that they are bound by their acts where a repudiation of such acts would result in manifest wrong to innocent parties. Of course this refers to contracts which are not in themselves void if made by an individual, and the court says (page 309): "I have already adverted to the rule that where the illegality of the contract consists in the violation of some law, the prohibitions of which are aimed at one of the parties only, the other party is to be treated as comparatively innocent and may have relief against the more guilty party even in an action *ex contractu*."

In Parish v. Wheeler, 22 N. Y. 507, Comstock, J., uses this language: "If the purchase of the steamboat involved any breach of the public law, the corporation alone was guilty, because all the restraints of the statute or the common law, affecting the transaction, are imposed upon it alone. There is certainly no moral turpitude if a railroad corporation buys a steamboat or builds a church; nor is there any legal turpitude. It may be an excess of power, or a private breach of trust in respect to its stockholders. The latter may complain, or the state may interpose; but corporations themselves, like individuals, in dealing with other parties, must live up to the rules of common honesty." This was said in reference to a railroad corporation in the exercise of whose powers the public have an interest, and the rule may be applied to private corporations with even more propriety.

There was a contract made in violation of its charter by the Rider Life Raft Company (97 N. Y. 381), and here Miller, J., uses this language: "The rule is well settled that the plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong.

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It was said by Finch, J., in Seymour v. S. F. C. Association, 144 N. Y. 341: "That kind of plunder which holds on to the property but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state."

And why should not this association be required to pay back to these defendants their money? These defendants purchased an interest in these mortgages and now hold them through their trustee, the Continental Trust Company. That was the legal effect of their contract. For these they paid their money. The plaintiff says the association had no power to sell them. Then make restitution; place these defendants where they stood before this insolvent company seduced them through this unlawful device — if it is unlawful. This is only common honesty, and I see no reason why this plaintiff should be held exempt from its exercise.

The complaint should be dismissed, with costs, and judgment is so directed.

Judgment accordingly.

THE PEOPLE ex rel. GORDON McDONALD, Relator, *v.* LOUIS LEUBISCHER, Respondent.

(Supreme Court, New York Special Term, May, 1898.)

Contempt — A notary public, appointed by a foreign court a commissioner to take testimony, cannot commmit a witness for refusing to answer pertinent questions.

A notary public, appointed by a District Court of a foreign state as a commissioner to take the testimony of certain witnesses resident in the state of New York, for use in the foreign court, has no power to commit for contempt a witness who, when subpoenaed to appear before the commissioner by a justice of the Supreme Court in accordance with section 915 of the Code of Civil Procedure, refused to answer pertinent questions.

The power to punish for such a contempt, contained in sections 920 and 3001 of the Code of Civil Procedure. can only be exercised by a court.

HABEAS CORPUS to procure the discharge of the relator from arrest in proceedings for contempt.

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William Jay (David McClure, of counsel), for relator.

John W. Hutchinson, Jr., for respondent.

COHEN, J. On the 26th of March, 1898, a commission was issued out of the District Court of Arapahoe county, Colorado, directed to Edward J. McCabe, a notary public, and appointing him a commissioner, and authorizing and requiring him to examine, among others, the above-named relator as a witness in a certain action then pending in the said District Court, and to reduce the examination to writing, etc.

Subsequently, and on the 4th day of April, on application to one of the justices of this court under section 915 of the Code of Civil Procedure, a subpoena was issued to the relator and others directing them to appear before said commissioner, at his office, to be examined, and reciting that "*for a failure to appear*" the relator would be guilty of a contempt of court. McDonald duly appeared before the commissioner, and after having been sworn and having answered some questions, refused to answer others under the advice of counsel. The commissioner thereupon issued a commitment, signed "commissioner and notary public," directed to the respondent, a marshal of the city of New York, and to the sheriff of the county, against said McDonald, for contempt under section 920 of the Code, and he was by said marshal taken into custody. The petitioner thereupon sued out a writ of *habeas corpus*, and the marshal having filed his return, the question now before the court is, whether the prisoner should be discharged or remanded? The petitioner asks his discharge on the ground that he is restrained of his liberty without authority of law. As the pleadings are not before me I cannot pass upon the materiality or the pertinency of the questions which the relator refused to answer. It is conceded that some of the questions were pertinent, and certain it is that "the party, at whose instance the relator attended, makes oath that the testimony of the witness * * * is so far material, that without it he cannot safely proceed with the trial of the action", as required by our Code (§ 3001). It was also conceded on the argument that the commitment was sufficient in form provided there was any authority in the commissioner to issue it.

It seems to me that the commissioner had no such authority. The fact that the person named happened to be, and is also designated as, a notary public cannot alter the conclusion. Power and

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authority were conferred upon him by the District Court of Arapahoe county, in the state of Colorado, and by it he was made a commissioner and directed as such commissioner to take the testimony of certain witnesses.

Under section 915 of the Code, he had no power to command the witnesses named to appear before him. That was given by statute to a judge of this court. If the position of the respondent is correct, we are confronted by a judicial officer who finds himself in this somewhat anomalous situation; with no power to command the attendance of a witness, he yet has the greater power to imprison him, after the witness had appeared. The Court of Appeals has held that it is not in the power of a justice of this court, in a similar case, to hear or determine, under sections 914-920 of the Code, an application to punish a witness for contempt. Matter of Searls, 155 N. Y. 333. But the court in its opinion expressly refrains from deciding what power such a commissioner may lawfully exercise when a witness is brought before him. It is true that it decided that a notary was a public officer (People v. Rathbone, 145 N. Y. 437), and intimated that his duties are of a judicial character (Matter of Searls, *supra*), but the latter proposition was a *dictum* and not necessary to a decision of the questions before the court in either case. We have been recently advised by that court that "It was not our intention to decide any case but the one before us. * * * If, as sometimes happens, broader statements were made by way of argument or otherwise than were essential to the decision of the questions presented, they are the *dicta* of the writer of the opinion and not the decision of the court. A judicial opinion, like evidence, is only binding so far as it is relevant, and when it wanders from the point at issue it no longer has force as an official utterance." Colonial Traction Co. v. Kingston R. R. Co., 154 N. Y. 493. This caution was given more recently still in Stokes v. Stokes, 155 N. Y. 581. But, as has been intimated, it can make no difference in this case whether the commissioner was or was not a notary public, because his powers are such as have been conferred upon him as a commissioner *only*, by a court of foreign jurisdiction, and other powers he has none, except such as he may lawfully derive from the statutes of this state.

It is contended that the power to punish for a contempt is contained in sections 920 and 3001 of the Code, which are as follows:

"Section 920. A person who fails to appear, at the time and

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place specified in a subpoena, issued as prescribed in this article, and duly served upon him; or to testify; or to subscribe his deposition, when correctly taken down, is liable to the penalties, which would be incurred in a like case, if he was subpoenaed to attend the trial of an action in a justice's court; and for that purpose, the officer, before whom he is required to appear, possesses all the powers of a justice of the peace upon a trial."

"Section 3001. Where a witness, attending before a justice [of the peace] in an action, refuses to be sworn or affirmed in the form prescribed by law or to answer a pertinent and proper question, or neglects or refuses to produce a book or paper which he has been duly subpoenaed to produce, as prescribed in section 2969 of this act, or duly required to produce by an order, made as prescribed in section 867 of this act, and the party at whose instance he attended makes oath that the testimony of the witness, or the book or paper, is so far material that without it he cannot safely proceed with the trial of the action, the justice may, by warrant, commit the witness to the jail of the county."

Is this contention correct? It may be stated, as a general proposition, that the power to punish for contempt is judicial in its nature, and is an *incident* of a court only. Wilckens v. Willet, 1 Keyes, 521; People ex rel. McDonald v. Keeler, 99 N. Y. 463. Indeed, the subject of contempts is treated by the Code itself as "a power and attribute of the courts" (Art. 6, chap. 1; title i, art. 2), and in article first is contained an enumeration and classification of the courts referred to in the Code. I can find no mention of this commissioner's court, or of its powers or jurisdiction, either in the sixth article of the Constitution or the statute law of this state.

The power to punish for contempt is so closely guarded that it is not even given to Congress or the Legislature of this state, except in so far as it is auxiliary to the legislative power only. Kilbourn v. Thompson, 103 U. S. 168; People ex rel. McDonald v. Keeler, *supra.*

I cannot, therefore, regard the respondent's position as sound, as it would follow that the Legislature gave to an individual with no judicial function, except possibly to pass on the pertinency of a question, the power to punish for a contempt of a court which is not known to the laws of this state

But it may be said that the Legislature so clearly intended that, for the purposes of comity between the states, a person designated by a court of another state should have the power to deprive a

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citizen of this state of his liberty, that there is no room for judicial construction. If such were the purpose and intent, such legislation is a violation of the Bill of Rights as embodied in section 6 of article 1 of the Constitution, which forbids that anyone shall be deprived of liberty without due process of law.

"This provision is the most important guarantee of personal rights to be found in the federal or state Constitutions. It is a limitation upon arbitrary power and is a guarantee against arbitrary legislation. No citizen shall be arbitrarily deprived of his life, liberty or property. This the legislature cannot do, nor authorize to be done. * * * This great guarantee is always and everywhere present to protect the citizen against interference with these sacred rights."

This is a characterization of the term "due process of law" by Judge Earl in Stuart v. Palmer, 74 N. Y. 183, and tested by it, has this relator been deprived of his liberty by "due process of law?" Let us consider what the effect of such an adjudication would mean. By the designation of a court in another state of a commissioner, he may set up his office here and his court and by virtue of his authority imprison anyone of our citizens. This commissioner, if he happens to be a notary public, may be one of over 4,000 of our citizens; if he be not a notary, he may be one of the six and a half million inhabitants of this state, whether citizen or alien; he even may be an inhabitant of any of the United States or of a foreign country (§ 814). By the Code provisions hereinbefore referred to, without any knowledge of his character or intelligence or citizenship, the Legislature stamps its authority on such an individual, establishes a court over which he shall be judge, and bestows as an incident of his judicial office the grave power to punish for contempt.

This brief recital of possibilities makes clear the arbitrary character of such legislation and its reckless disregard of the liberty of our citizens.

I am impressed in reaching this conclusion by the wisdom of Mr. Justice Miller in leaving "the meaning of the term 'due process of law' to be evolved by the gradual process of judicial inclusion and exclusion as the cases presented for decision shall require with the reasons on which such decisions may be founded." Davidson v. New Orleans, 96 U. S. 97.

There is a decision of this court on the question here presented. In the Matter of Bloomingdale, February, 1879, N. Y. Monthly

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Law Bulletin, vol. 1, it was held, without further statement of reasons, that a similar commitment was void and without authority. I am but following that ruling; as, however, the determination of the question presented is far reaching and important in its consequences, the relator's counsel must stipulate to argue the appeal, during the present term of the Appellate Division, from any order that may be entered on this decision.

The prisoner is discharged.

Ordered accordingly.

THE PEOPLE ex rel. JOHN D. ELWELL, Relator, *v.* THE MANHATTAN CHESS CLUB, Defendant.

(Supreme Court, New York Trial Term, May, 1898.)

Clubs — Expulsion — Jurisdiction — Notice — Opening a sealed letter to a club president and readdressing it to one's self.

A person who joins a club presumably assents to its constitution and where this provides that a member, guilty of any conduct prejudicial to its interests, may be suspended by its directory and may subsequently be expelled by a majority vote of the club at its next meeting, the court will not interfere with an expulsion, of whose regular proceedings the expelled member had due notice but in which he declined to participate in any manner whatever.

In such a case, if there is jurisdiction, a valid by-law and no arbitrary or capricious exercise of power, the legal remedy of the person expelled is at an end.

The opening of a sealed letter, addressed to the president of a club and pertaining to its business, and the destruction of the original envelope and substitution of another, so as to make it appear that the letter was addressed to the person who opened it, is a sufficient ground for expulsion.

PROCEEDINGS by alternative mandamus to try the relator's right to membership in the defendant club.

Conway & Westbrook, for relator.

R. H. Channing, for defendant.

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McAdam, J. The relator seeks reinstatement to membership in defendant club, from which he was expelled for wrongfully opening a sealed letter addressed to its president, pertaining to the club's business, destroying the original envelope and substituting one of his own, to make it appear that the letter had in the first instance been addressed to the relator. The club deemed the offense of sufficient importance to call upon him for some explanation, and he was in consequence summoned to appear before its board of directors and answer the charge. The relator refused to appear and challenged the right of the board to try him. The defendant's constitution provides that the government of the club shall be vested in a directory; that any member guilty of any conduct prejudicial to its interests may be suspended by it; that the action of the directory shall be reported at the next meeting of the society, and that it may then expel or reinstate such member by a majority vote. The directory, on September 1, 1896, tried the relator, and on the proofs presented convicted him of the offense, and after transmitting this result to the club, the organization, by a vote of forty-seven in the affirmative to five in the negative, expelled the relator from membership. The proceedings taken were regularly conducted in strict accordance with the constitution and by-laws. The tribunal that tried the relator was the one provided by the by-laws, to which the relator had assented; it had jurisdiction in the particular case and acted within the scope of powers conferred upon it, and its adjudication is conclusive and final. Instead of resorting to the courts for relief the relator ought to have availed himself of the remedies provided by the constitution of the society, and accepted the trial accorded to him, but this he declined to do, although offered by the directory every opportunity to vindicate himself or to extenuate the offense. In such a case the court need only look so far into the case as to satisfy itself that the society had jurisdiction, and the by-law under which it acted was valid, for if it finds that there was jurisdiction, a valid by law, and no arbitrary or capricious exercise of power, the legal remedy of the person expelled is at an end. Bacon on Ben. Soc. (2d ed.), § 442; People ex rel. Johnson v. N. Y. Produce Ex., 149 N. Y. 401. The defendant seems to have acted in good faith and within its jurisdiction to discipline a member for conduct prejudicial to its interests, and the relator ought to have gone before the directory and the club itself and defended his right to membership against the charge preferred. If he had

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done so he might have had no cause to complain of the result. Not having protected himself in this, the appropriate manner, he has no right to litigate here the questions he might and ought to have contested there. The rule is, "that where one voluntarily becomes a member of an incorporated society, whose by-laws provide a certain method of amotion for certain specified causes, the assent of the member thereto being a fundamental condition of his tenure of membership, the right of amotion is clearly established in the corporate body, and may be duly exercised in the manner and for the purpose prescribed. And where, under such an organization, a corporator has been regularly tried and expelled in due form, the sentence of the corporate body, thus acting in a judicial capacity, is not to be questioned collaterally, nor will the merits of such expulsion be examined in proceedings for a mandamus." High's Ex. Rem., § 292; see, also, Loubat v. Le Roy, 15 Abb. N. C. 1, and note; S. C., 40 Hun, 546; Gebhard v. N. Y. Club, 21 Abb. N. C. 248; White v. Brownell, 2 Daly, 329; Hurst v. N. Y. Produce Ex., 100 N. Y. 605; 1. Cent. Repr. 265, and opinion of court below in same case, to be found in 742 Court of Appeals cases in Law Library; Commonwealth v. Union League Club, 135 Penn. St. 301; Matthews v. Associated Press, 136 N. Y. 333; Lewis v. Wilson, 121 id. 284; Fudickar v. Guardian M. L. I. Co., 62 id. 392. In accordance with this policy it is now agreed that "courts should not, as a general rule, interfere with the contentions and quarrels of voluntary associations, so long as the government is fairly and honestly administered, and those who have grievances should be required in the first instance to resort to the remedies for redress provided by their rules and regulations." Lafond v. Deems, 81 N. Y., at p. 514. The offense charged was, in effect, a breach of duty by the relator as a corporator in the club, one which the directory might lawfully try, and not the violation of the Federal Postal Laws, as the relator seems to suppose. Of course, the relator was to be tried by his fellow members; he knew that when he joined the club; he found that provision in its constitution, and pinned his faith to it. He cannot now complain that they were interested in getting him out. The members of the directory had no personal or pecuniary interest in the charge against the relator or its result, and acted as they lawfully might for what they regarded as the general good and welfare of their organization, and the fact that the charge emanated from them did not disqualify them from acting as triers in the first instance. What they did was founded on absolute duty im-

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posed by the constitution, not by prejudice or bias. The decision by the directory did not operate as an expulsion until approved of by the club, and it is the final act of expulsion by the club itself that constitutes the grievance complained of. The relator deliberately allowed the proceedings in the inferior tribunal to go against him by default, when they might perhaps have eventuated in his favor if he had contested them as he ought to have done. He now seeks to have the case reopened and tried in this court upon mandamus. There is nothing to recommend or justify such novel procedure, and everything practical against it. The relator has no substantial grievance which calls for judicial interference by mandamus, and his proceedings must, on the conceded facts, be dismissed, with costs.

Proceedings dismissed, with costs.

WILLIAM J. HARDY et al., Plaintiffs, *v.* THE KNICKERBOCKER TRUST CO., as Committee of the Property of MARY A. LUCAS, an Incompetent Person, Defendant.

(Supreme Court, New York Special Term, May, 1898.)

Preference on the calendar — One who claims a statutory preference will be held to strict practice.

Where the plaintiff seeks a preference on the calendar upon the statutory ground that the sole defendant is the committee of a lunatic, strict practice must be followed and a notice that an application for the preference will be made at the opening of court must be served at the same time with the notice of trial.

A statement, contained in a notice of trial, "that a preference is claimed herein, under section 791, subdivision 5, of the Code of Civil Procedure, on the ground that the Knickerbocker Trust Co., as the committee of the property of Mary A. Lucas, an incompetent person, is the sole defendant herein," is an insufficient compliance with section 793 of the Code of Civil Procedure.

MOTION for an order of preference.

Hardy & Kennedy, for motion.

Davies, Stone & Auerbach, opposed.

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GILDERSLEEVE, J. This is a motion for a preference on the statutory ground that the sole defendant is the committee of a lunatic. See Code, § 791, subd. 5. It is not claimed by the moving party here that there has been an exact compliance with the requirements of section 793 of the Code, which provides that a party desiring a preference of any cause shall serve upon the opposite party, with his notice of trial, a notice that an application will be made to the court, at the opening thereof, for leave to move the same as a preferred cause. The notice of trial in the case at bar was served on April 16th, while the notice of motion for the preference was served on April 29th. In the notice of trial, however, it is stated "that a preference is claimed herein, under section 791, subdivision 5, of the Code of Civil Procedure, on the ground that the Knickerbocker Trust Co., as the committee of the property of Mary A. Lucas, an incompetent person, is the sole defendant herein." It is urged by the plaintiff that this statement in the notice of trial is a sufficient compliance with the provisions of the statute. I think this position untenable. In the case at bar, the motion is not addressed to the discretion of the court, but made solely as a matter of right under the terms of the statute; and, in the case of Marks v. Murphy, 27 App. Div. 160; 50 N. Y. Supp. 622, the Appellate Division have held that where a motion for a preference is made solely as a matter of right, under the terms of the statute, parties are held to strict practice. The motion must be denied, for the reason that the plaintiff has not observed the strict practice required under the circumstances.

Motion denied.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* BECKIE KURMINSKY, Defendant.*

(Supreme Court, New York Criminal Term, January, 1898.)

Liquor Tax Law — An indictment found under it may, on the application of the district attorney, be dismissed by the court, in furtherance of justice — Practice as to a nolle prosequi considered — Code of Criminal Procedure, § 671.

The power and right of a district attorney to apply, under section 671 of the Code of Criminal Procedure, to the court for the dismissal

*Received too late for insertion in proper place.— [Rep.

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of an indictment, in furtherance of justice, is, in the case of an indictment found under the Liquor Tax Law (Laws of 1896, chap. 112), neither affected nor impaired by sections 37 (as amended by Laws of 1897, chap. 312) and 38 of that statute, making it the duty of a district attorney to prosecute any person violating the statute and further declaring that "any officer who shall neglect or refuse to perform his duty under its provisions shall be liable to a penalty of $500, and if a district attorney shall be removed from office." These sections do not, by implication, repeal section 671 of the Code of Criminal Procedure. Former and present practice, relative to the entry of a *nolle prosequi*, considered.

APPLICATION to dismiss an indictment.

Asa Bird Gardner, district attorney, for People.

Stephen J. O'Hare, for defendant.

FURSMAN, J. This is an application to dismiss an indictment. The district attorney had indorsed upon the indictment the following statement: "Were this case to be the subject-matter of an official recommendation to the court, I should unhesitatingly affirm the impossibility of a conviction upon the merits, and request the court to make a final disposition thereof by the dismissal of this indictment." In view, however, of the provisions of sections 37 and 38 of the Liquor Tax Law (Laws of 1896, chap. 112; amended 1897, chap. 312), he is in doubt whether such recommendation can properly and legally be made by him. He, therefore, submits that question to the court for determination.

At common law the attorney-general alone had power to enter a *nolle prosequi*. This he could do without application to the court. Indeed, the court itself could not, of its own motion, direct the entry of this order. See People v. McLeod, 1 Hill, 377, at p. 405. In actual practice, however, it became customary for district attorneys, who were regarded as in some sense representing the attorney-general, to exercise this power. This very questionable practice led to the adoption of a provision in the Revised Statutes declaring it to be unlawful for any district attorney to enter a *nolle prosequi* upon any indictment, "or in any other way to abandon the same" without leave of the court. Edmonds' edition N. Y. Statutes at Large, vol. 2, p. 752 § 54. Even under this statute it

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was said that the court could not of its own motion enter a *nolle prosequi*. Thomason v. De Mott. 18 How. Pr. 529. There was always, however, inherent power in the court to set aside an indictment in a proper case, whether of its own motion, or on motion of the accused, or of the district attorney. People v. Brickner, 15 N. Y. Supp. 528; People v. Restenblatt, 1 Abb. Pr. 268; People v. Briggs, 60 How. Pr. 17; see page 42 and cases there cited. This was the history of the law concerning the rights and power of the court and the district attorney in relation to the disposition of indictments, otherwise than by trial, down to the adoption of the Code of Criminal Procedure. By section 671 of that act, authority is conferred upon the district attorney to apply for the dismissal of an indictment, and the court is empowered to act upon such application and to order such dismissal, or it may do so on its own motion. The precise question here is, whether there is anything in sections 37 and 38 of the Liquor Tax Law taking from the district attorney the right to make the application provided for by section 671 of the Code of Criminal Procedure. The power of the court to order such dismissal of its own motion cannot be questioned. There is nothing in the Liquor Tax Law prohibiting such action. Section 37 of that act makes it the duty of the district attorney to prosecute any person violating any of the provisions of the act (Amendment of 1897, § 37), and section 38 (Act of 1896) declares that "any officer who shall neglect or refuse to perform his duty under the provisions of this act shall be liable to a penalty of five hundred dollars, * * * and if such officer be * * * a district attorney, shall be removed from office * * * ."

There are many statutes which impose specific duties upon district attorneys, and, although no special penalty is provided for a neglect or refusal to perform them, it has always been a recognized rule that, where the law imposes a duty upon a public officer and he neglects or refuses to perform it, he may be indicted therefor (Bouvier's Law Dict., title "Negligence"), and of course in certain cases removed from office. Among the recognized duties of this officer is the prosecution of all offenders who are presented by indictment, and it is clear that a wilful neglect or refusal to discharge this duty in any proper case will subject him to indictment and expose him to removal from office; yet he has always had authority either to ask leave to enter a *nolle prosequi* (before the Code), or, since the Code, to apply for a dismissal of any indict-

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ment. The state Constitution (art. 13), in relation to bribery declares (section 6) that "Any district attorney who shall fail faithfully to prosecute a person charged with the violation in his county of any provision of this article which may come to his knowledge, shall be removed from office by the Governor," but there can be no doubt, I think, that if, after indictment, it is found that there is an entire failure of proof, the district attorney may apply to the court for a dismissal under section 671, without exposing himself to the penalty thus prescribed for not "faithfully" prosecuting the person indicted. Section 38 of the Liquor Tax Law is highly penal and is, therefore, to be construed with great strictness. There is no provision of the act expressly repealing section 671 of the Code of Criminal Procedure, nor is there any conflict between them such as to create a repeal thereof by implication. The statute does not mean that the district attorney shall prosecute a hopeless case. The law never requires the performance of a vain thing. Suppose, after an indictment found under this law, the district attorney in commencing his preparation for trial discovers that every witness has since died and he is, therefore, without a particle of proof. Must he put the defendant upon trial, impanel a jury, open his case, and then declare that he is without the least proof to sustain the charge and leave the court to direct an acquittal? The legislature cannot have meant to require such a foolish thing. This is, of course, an extreme case, but it furnishes an illustration by which the intent of the legislature, as affecting section 671, may well be tested. This section (671) and the duties and penalties imposed by sections 37 and 38 of the Liquor Tax Law are in harmony rather than in conflict. Thus considered, the requirement of section 37 is the performance by the district attorney of the duty of prosecution whenever there is fair reason to believe, from the evidence at command, or which by diligence may be obtained, that a conviction can be, or, if properly weighed, ought to be had; and the penalty imposed by section 38 is for a wilful or corrupt disregard of this duty, or, at most, a careless neglect to perform it. But where a diligent and honest investigation discloses an utter want of necessary proof, or if for any other reason in the intelligent and honest discharge of his duty the district attorney becomes satisfied that a conviction cannot be had, he may avail himself of the provisions of section 671, and recommend a dismissal without thereby exposing himself to any penalty whatever. It would, indeed, be monstrous to say that a district attorney will make himself liable to a fine and

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removal from office for suggesting to the court a state of facts and recommending a dismissal of an indictment thereon in a case where the court might, and indeed ought "in furtherance of justice" to direct a dismissal of its own motion, upon deriving the same information from any other source.

Ordered accordingly.

Matter of the Judicial Settlement of the Accounts of JESSE K. CUTLER, as Sole Surviving Executor, Etc., of JESSE B. KENYON, Deceased.

(Surrogate's Court, Otsego County, May , 1898.)

Life-tenant and remaindermen — The savings of the life-tenant, from income, are her own property — Gains, made by her change of investments, are capital which passes to the remaindermen.

A life-tenant given by the will of her husband all his residuary personal estate "for her sole use and benefit, and subject to her control during her natural life" is entitled to the whole income in each year, and any savings which she has made from it are her absolute personal estate. Where it appears, however, that the residuary estate was composed entirely of choses in action and that the life-tenant changed their investment to some extent, the court will, upon a contest between her next of kin and the remaindermen, in the absence of any definite proof as to the cause of an increase in the fund, ascribe it to gains made upon sales and will, therefore, award it to the remaindermen as capital.

PROCEEDINGS upon judicial settlement of surviving executor's accounts.

Edson A. Hayward, for executor.

James H. Keyes, for heirs of Jesse B. Kenyon, deceased.

James W. Tucker, for Moses Lippitt.

ARNOLD, S. The testator Jesse B. Kenyon died about 1869. By his will he made certain bequests, and then followed this clause: "Lastly, I give and bequeath all the rest, residue and remainder

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of my personal estate, goods and chattels of whatsoever name or nature to my wife Catharine for her sole use and benefit, and subject to her control during her natural life, after which one-half of the remainder to be devised among my kindred as the law may direct, the other half subject to the will of my wife Catharine as she may devise among her kindred."

The will appointed testator's widow, Catharine Kenyon, and Jesse K. Cutler, executors thereof. In 1870 these executors filed a petition for and had a judicial settlement of their accounts. The specific legacies were duly paid and a decree of this court was entered settling the accounts. The remainder of the estate passing under the clause of the will above quoted, was found in and by said decree to be $8,832.67. No part of this remainder was in money; that sum represented the par value of certain stocks, bonds and other securities which were turned over, as such estate in remainder, to Catharine Kenyon, life tenant.

She assumed and had sole charge, care and control of the estate in remainder from that time down to the time of her death. She died on the 13th day of March, 1895, leaving a last will and testament which has been duly admitted to probate and letters testamentary issued thereon. Upon the death of Catharine Kenyon, the surviving executor took charge of said estate in remainder. In these proceedings for a judicial settlement of his accounts as such surviving executor, numerous questions are raised by the various parties interested. I have given all of these questions very careful consideration and have passed upon them all in the findings filed herein. None of these questions warrant any discussion here, except, perhaps, the question raised as to the portion of this estate which should pass to the representative of the estate of Catharine.

As stated before, the estate in remainder of which Catharine had a life use, was made up of stocks, bonds and other securities of the par value of $8,832.67. What the actual value was, does not appear. By the accounts of the surviving executor filed in this proceeding, it appears that he has realized in cash from the sale of securities which came into his hands upon the death of the life tenant, the sum of about $12,000. Some part of this sum may be accrued interest.

It is claimed by those interested in the estate of Catharine Kenyon that the difference between this sum and the sum first above stated (being about $3,000), represents accumulations of income; that these accumulations belong to the estate of Catharine Kenyon;

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that the heirs of Jesse B. Kenyon should now be paid only one-half of the said sum of $8,832.67, and that the balance of the moneys now in the hands of the surviving executor should be paid to the personal representative of the estate of Catharine Kenyon, to be distributed under her will.

It is a settled rule of construction that courts in the determination of questions of this kind are to be guided by the intent of the testator, to be ascertained from a consideration of all the provisions of his will. Under the provisions of this will, the life tenant was undoubtedly entitled to the income from the estate in remainder. If she succeeded in living within that income and saved each year a part thereof, these savings undoubtedly belonged to her absolutely and became her personal estate. Shangle v. Hallock, 6 App. Div. 56; Hendricks v. Hendricks, 3 id. 604.

It now becomes necessary to determine whether this apparent increase is the result of accumulations of income, or whether it is simply an increase resulting from the sale of the stocks, bonds and other securities of which the estate in remainder consisted. No evidence is offered by any of the parties, except such as can be gleaned from the accounts filed in 1870 and the accounts now before the court. As before stated, the par value of the stocks, bonds and other securities which constituted the estate in remainder in 1870, was $8,832.67. What the actual value of these securities were at that time does not appear. It might have been twice the par value or any other sum. Among the securities were nineteen shares of bank stock; seven of these shares were sold by the life tenant; the remaining twelve shares were sold by the surviving executor for $2,040. If the other seven shares only brought par this would give an increase of $840.

The estate in remainder also consisted of $3,000 in towns bonds of the towns of Milford, Otsego and Richfield, and $3,000 in government bonds. These were sold by the life tenant, and the proceeds reinvested in other securities. The law is settled, I think, that in investments and reinvestments of this kind, gains realized are capital and not income. Gains made on stock taken at par and sold above par are accretions to the estate in remainder. Chaplin on Express Trusts & Powers, page 313; Matter of Gerry, 103 N. Y. 445.

No presumption will lie that this remainder has been increased by accumulations of income. The estate in remainder was in the sole charge of the life tenant. The investments and securities

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coming into the hands of the surviving executor, on their face, all belong to the estate in remainder. It will not be presumed that the life tenant mixed her own moneys with the moneys belonging to the estate in remainder; or that she invested her own moneys as executrix, or in the name of the estate.

I have accordingly found that the moneys now in the hands of the surviving executor, all belong to the estate in remainder.

A decree may be entered according to the findings.

Decreed accordingly.

Matter of the Final Judicial Settlement of the Accounts of ANN MILLER, as Administratrix, Etc., of ANDREW J. MILLER, Deceased.

(Surrogate's Court, Otsego County, May, 1898.)

A joint liability cannot be set off against an individual one — Waiver.

The mere admission, without objection, upon a judicial settlement, of a joint note of two persons sought to be set off by the administratrix against the liability of her intestate to one of them, does not establish the counterclaim and it remains the duty of the court to decide the question according to the established law that such a set-off is not permissible.

MOTION for reargument in the above-entitled proceedings as to the claim of Emma Crounse.

James W. Barnum, for motion.

Charles T. Brewer, opposed.

ARNOLD, S. In the matter of the claim of Emma Crounse against Andrew J. Miller, deceased, I decided that the joint note of Emma Crounse and her husband, held by the administratrix of Miller's estate, could not be allowed as a counterclaim.

A motion is now made for a reargument. Counsel for the administratrix points to the fact that the note was received in evidence without objection, and he insists that, therefore, any objection which might have existed to its being considered as a counterclaim was waived; that the objection being waived, the note

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establishes the liability of Emma Crounse for its face value, with interest, and that that amount should be allowed as a counterclaim.

Upon the submission of the case, it was the duty of the court to consider the effect of the evidence. If the evidence offered by the claimant failed to establish a cause of action against the administratrix, her claim had to be dismissed, whether such evidence was objected to or not; on the other hand, if the evidence of the claimant established a cause of action, the administratrix, to establish a counterclaim, had to prove a cause of action against claimant.

Does the evidence establish a cause of action against the claimant, individually?

The evidence establishes the joint liability of Emma Crounse and Levi Crounse; therefore, a joint judgment could only be rendered upon it. St. Michael's Church v. Behrens, 10 Civ. Pro. 181-189.

The Code of Civil Procedure does not allow such a cause of action as a counterclaim to an individual liability. § 501.

The evidence does not establish a cause of action against claimant, individually. Spofford v. Rowan, 124 N. Y. 108, at p. 113.

I have carefully examined the points submitted by the learned counsel for the administratrix, and the cases that he has cited. I cannot see that those cases conflict in any way with the cases cited above, or with the views herein expressed. The other matters referred to in the moving papers had been allowed before this motion was made.

The motion is denied, with $10 costs.

Motion denied, with $10 costs.

WALTER E. ANDREWS, Respondent, *v.* THE NORTH RIVER ELECTRIC LIGHT & POWER CO., Appellant.

(City Court of New York, General Term, May, 1898.)

Electric light and power corporations — Construction of Laws of 1890, chap. 566 — Duty of an applicant to reply when the company inquires how much light and power he wants.

Where an electric light and power company, subject to the provisions of chapter 566 of the Laws of 1890, replies to a demand, made by an owner or occupant of premises within 100 feet of its wires, that it

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furnish him "with electric light and power at once" by asking him, in writing, how much light and power he wants, it is his duty to answer and, failing this, he cannot successfully maintain an action against the corporation to recover of it the penalty imposed upon it by section 65 of the statute for a neglect or refusal to supply "electric light as required."

APPEAL from a judgment in favor of plaintiff.

Charles P. Hallock, for respondent.

Tierney & Halsey, for appellant.

FITZSIMONS, Ch. J. The defendant is an electric light and power company carrying on business in the city of New York. The plaintiff, residing at No. 729 Tremont avenue, New York city, opposite which the defendant's electric light wires are strung, served on the defendant on June 10, 1896, a written notice as follows: "In compliance with the statutory provision I hereby demand that you supply me at my office, 729 Tremont avenue, New York city, with electric light and power at once." On the same day the defendant replied to said communication as follows: "How many lights and how much power do you want?" to which plaintiff never replied either in writing or verbally. His next move was made on July 11, 1896, when this action was commenced by him.

The statutory provision upon which plaintiff relies herein is section 65 of chapter 566 of the Laws of 1890. It reads as follows:

"Upon the application, in writing, of the owner or occupant of any building or premises within one hundred feet of any main laid down by any gas light corporation, or the wires of any electric light corporation, and payment by him of all money due from him to the corporation, the corporation shall supply gas or electric light as may be required for lighting such building or premises, * * * and if for the space of ten days after such application, and the deposit of a reasonable sum as provided in the next section, if required, the corporation shall refuse or neglect to supply gas or electric light as required, such corporation shall forfeit and pay to the applicant the sum of ten dollars, and the further sum of five dollars for every day thereafter during which such refusal or neglect shall continue; provided that no such corporation shall be required to lay service pipes or wires for the purpose of supplying

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gas or electric light to any applicant * * * nor unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay the cost of his portion of the pipe or wire required to be laid, and the expense of laying such portion."

Section 66 of said act reads as follows:

"Every gas light and electric light corporation may require every person to which such corporation shall supply gas or electric light for lighting any building, room or premises to deposit with such corporation a reasonable sum of money according to the number and size of lights used or required, or proposed to be used for two calendar months, by such person and the quantity of gas and electric light necessary to supply the same as security for the payment of the gas and electric light rent or compensation for gas consumed, or rent of pipe or wire and fixtures, to become due to the corporation, but every corporation shall allow and pay to every such depositor legal interest on the sum deposited for the time his deposit shall remain with the corporation."

Under section 65 it was the duty of the plaintiff to clearly specify in his written application what electric light and power he required for use in his premises, particularly so in this instance, because of the letter of the defendant to him in response to his notice, requesting him to name the number of lights and power needed. Such request, on the defendant's part, was reasonable and proper and should have been complied with by plaintiff. Section 65 reads that the defendant must furnish all electric light and power *required* by the applicant, and, therefore, casts upon him the obligation of naming *just what he requires*, and no duty rests upon the defendant to furnish light and power to any person until such applicant makes such requisition. The justice of this rule, we think, is apparent when we consider the fact that one man may think one light is all he requires, while another man for lighting the same premises, may think that 100 are none too many. Besides, for the purpose of permitting the defendant to fix the cash deposit, which it may require from the applicant under section 66 of the act in question, the number of lights and power required should be named, because how else may the defendant fix such charge.

As we view the act under consideration, the plaintiff has failed to establish herein a cause of action against the defendant, because of his refusal to furnish in writing, as required by the defendant, the number of lights and power required by him in his premises. Until he did so, no duty rested upon the defendant to furnish him with light or power.

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The motion made by the defendant's counsel to dismiss the complaint should have been granted.

Judgment reversed and complaint dismissed, with costs to appellant.

O'DWYER, J., concurs.

Judgment reversed and complaint dismissed, with costs to appellant.

FREDERICK SOUTHACK et al., Respondents, *v.* J. HENRY LANE, Appellant.

(City Court of New York, General Term, May, 1898.)

Real estate brokers — When acting as middlemen, they may collect commissions from both sides.

Where real estate brokers act simply as middlemen or intermediate negotiators, in order to bring the principals together and enable them to make their own bargain, the brokers may properly act for and claim commissions from both sides.

APPEAL by the defendant from a judgment entered upon a verdict in favor of plaintiffs and from an order denying a motion for a new trial.

Howard A. Taylor (Albert S. Bard, of counsel), for appellant.

Michael H. Cardozo (Edgar J. Nathan, of counsel), for respondents.

O'DWYER, J. No relation of principal and agent existed between plaintiffs and defendant.

The option was for the purchase of the premises, and was not in any sense the creation of an agency. That such is the fact is proved by the following allegation of the defendant's answer:

"This defendant gave to said plaintiffs an option or refusal for the purchase of said lots at the price of $180,000, which refusal was to continue for the period of two weeks."

Further proof that the defendant did not understand that an agency or any relation of trust or confidence existed between him and the plaintiffs is found in his own testimony in reference to the

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application of Mr. Deane to secure the option. The defendant testified as follows:

"It finally resulted in his (Mr. Deane's) asking for an option, and I told him if he would give me $5,000, I would give him an option. He asked for an option at $180,000, and I said if he would give me $5,000, I would give it to him."

Surely, no owner of property ever dreamed of exacting payment from his agent for the sole purpose of negotiating on the principal's behalf a sale of property. The extent of the commission of 1 per cent. which the agent might possibly earn on a sale of $180,000 would be $1,800. For the purpose of earning $1,800 the defendant would now contend he expected plaintiffs to pay $5,000. Thus, is it manifest that when the option was given, the defendant not only consented to sell to the plaintiffs themselves, but that they could themselves retain any profit they might realize over the fixed price.

It is thus shown by the words of the defendant himself that the transaction in question was somewhat unusual, and that the plaintiffs acted not as confidential agents dealing with their principal, but as brokers acting on their own behalf with the right to enforce an option against the defendant in any way they saw fit. It is obvious that this defendant did not expect the exercise of any skill, judgment or discretion from the plaintiffs, but released the latter from the slightest obligation to him. If the plaintiffs owed any such duty by reason of the fact that they had the property on their books for sale a year previous, that duty did not continue after the option was given.

The defendant, in his answer, alleges:

"Before the expiration of the said period — two weeks' further negotiations between the said plaintiffs and this defendant resulted in the making of a contract of sale between this defendant and the said William R. Rose for the sale of the said premises at the price of $176,000; and this defendant agreed to pay to said plaintiffs a commission of one-half of 1 per cent. on $175,000, a part of such price."

Taking the defendant's own concession, it thus appears that the only negotiation subsequent to the giving of the option was the transaction in the office of Rose & Putzel.

There is no doubt but that the plaintiffs in bringing the principals together acted with strict propriety; there was no suggestion in the evidence that Rose & Putzel would have paid more than

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$175,000, and they had never made an offer exceeding $170,000; the defendant stood firm at $180,000. The plaintiffs, as middlemen, saw no way of consummating a sale except to introduce the parties and let them make their own bargain then and there. The plaintiffs did not use the option with profit to themselves, as of right they could; and the option not having expired, it cannot be contended that the defendant relied upon them to disclose any fact or to guide him in any way. The defendant did not employ them as his agents to sell, but on the contrary he expressly gave them the right to buy themselves or in the name of another and reap any profit.

That the plaintiffs did render valuable services to the defendant cannot be questioned, but it may be that the defendant could have made the contract with Mr. Rose without subjecting himself to legal liability for the payment of any commissions. But that is not the case. The defendant made a special arrangement to pay.

The term "broker" is properly applied to a middleman, and the complaint correctly alleges the facts.

In 2 Am. & Eng. Encyc., p. 571, under "Brokers," it is said:

"The term 'broker' in its largest sense is applied to a specialist who acts as the medium of negotiating and contracting any kind of bargain."

And again, in the same volume, page 589:

"Where he acts simply as a middleman to bring the parties together, and takes no part whatever in the negotiations, there will be nothing illegal in his acting for both parties and claiming remuneration from each."

In Story on Agency, 9th ed., section 28, it is said:

"Properly speaking, a broker is a mere negotiator between the other parties, and he never acts in his own name, but in the names of those who employ him. * * * He is strictly, therefore, a middleman or intermediate negotiator between the parties."

The same learned author, at section 31, note 2, adds:

"Real estate brokers merely employed as middlemen to bring purchasers together to enable them to make their own bargain, are not agents to buy and sell, and may charge commissions to both parties."

To the same effect is the case of Hooper v. California, 155 U. S. 648, opinion, White, J., at page 657.

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The judgment and order appealed from should be affirmed, with costs.

O'DWYER and SCHUCHMANN, JJ., concur.

Judgment and order affirmed, with costs.

AUGUST HOEFLIN et al., Respondents, *v.* WILLIAM A. GEDNEY et al., Executors, etc., Appellants.

(City Court of New York, General Term, May, 1898.)

Revivor against executors — Terms — Restoration of the case to the day calendar.

An order, reviving an action against executors, was made after due service of the papers upon them and upon the appearance of an attorney for them and from the order the executors never appealed. It granted leave to serve a supplemental complaint, but without prejudice to prior proceedings or to the position of the case on the calendar, whereon it had been reserved generally. The order did not require a new note of issue.

Held, that the order was a valid exercise of the power of the court and, standing unattacked, gave the court power to restore the case to the day calendar.

APPEAL from an order restoring cause to the day calendar for trial.

John F. Meyer, for appellants.

E. W. S. Johnston, for respondents.

O'DWYER, J. The order for revivor recites that it was entered after proof of due service of the moving papers for a revivor upon the executors. It also recites that an attorney appeared on behalf of said executors, who did not oppose the granting of the motion. The authority of that attorney to appear is disputed, but the order was granted after service of the notice of motion upon the executors. The order was never appealed from, and no motion was made to vacate it, and that order provides that the granting of leave to serve a supplemental complaint shall be without prejudice to the proceed-

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ings already had in this action, and without prejudice to the position of the case upon the calendar of this court.

This court has complete control over its own calendar, and has power to provide that after issue has been joined and a note of issue filed, a new note of issue is not necessary, where it substitutes the personal representatives of a deceased defendant in his place and stead; and it has power to grant that substitution without prejudice to the proceedings had in the action, and to the original position of the case upon the calendar. Having that power and having exercised it, and the order which did exercise the power and granted the motion not having been appealed from, reversed, vacated or annulled, it is manifest that the court had power to restore the cause to the day calendar for trial. Hunnewell v. Shafer, 30 N. Y. St. Repr. 831.

As long as the order of revivor, providing that the revivor should be without prejudice to the position of this cause upon the calendar, stood, the order that was granted necessarily followed it, and the appeal from that order does not bring up anything before this court.

The original order of revivor having been entered upon notice to the executors, and an attorney having appeared on their behalf, and not opposing the granting of the motion, they were bound either to appeal from that order, if they felt aggrieved by the terms thereof, or they were bound to move to vacate the order, if it were not granted upon notice to them and, if the attorney who appeared for them did not have power to do so. That they have not done; and the terms of the order standing and providing that the position of the case on the calendar, which was reserved generally, should remain, and that the revivor should be without prejudice to such position on the calendar and to the proceedings already held in the action, it was a necessary result that the court, when moved to restore the case to the day calendar, should grant that order.

Order appealed from affirmed, with $10 costs.

SCHUCHMANN, J., concurs.

Order affirmed, with $10 costs.

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THE REEDY ELEVATOR CO., Appellant, *v.* THE AMERICAN GROCERY CO., Respondent.

(City Court of New York, General Term, May, 1898.)

1. **Action by a foreign corporation — Right to sue as affected by Laws of 1892, chap. 687, § 15 — The statute affects the remedy only.**

The provisions of section 15 of chapter 687 of the Laws of 1892, which forbid a foreign corporation to do business in the State of New York unless it has first procured a certificate from the secretary of state that it has complied with all the requirements of law to authorize it to do business and which enact that "No foreign stock corporation doing business in this state without such certificate shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate" permit such a corporation to maintain such an action where, although it had not such a certificate when the contract was made, it had obtained one before it begun its action upon the contract; the inhibition of the statute operating upon the remedy alone.

2. **Foreign corporation — Affidavit for attachment — License tax.**

A foreign corporation which did its first business in this state on November 24, 1896 and brought an attachment action on the contract then made upon November 15, 1897, has not, at the latter date, become liable to pay the license tax of one-eighth of one per cent. imposed upon such corporations by chapter 240 of the Laws of 1895, and hence its affidavit, for an attachment, need not allege payment of the tax and is sufficient where it gives the details of the contract and further alleges that the corporation has complied with all the requirements of the law of the state to authorize it to do business therein.

3. **Attachment.**

An attachment will be sustained unless the papers clearly indicate that the plaintiff must ultimately fail.

4. **Foreign corporation — Power of its president to contract for it.**

The president and executive officer of a corporation is impliedly vested with authority to transact its ordinary business and the corporation is liable upon a contract made for it by him.

APPEAL from an order vacating the attachment upon the papers upon which it was granted.

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Henry B. Wesselman, for appellant.

Dill, Seymour & Kellogg, for respondent.

SCHUCHMANN, J. The affidavit upon which the attachment was granted avers, that the plaintiff is a foreign corporation organized under the laws of the State of Illinois, and having an office and its principal place of business at Nos. 31 and 33 Tenth avenue, New York city, and has complied with all the requirements of the State of New York to authorize it to do business therein; and before the commencement of this action procured and received from the secretary of state of the State of New York his certificate in writing, in due form of law, under and pursuant to sections 15 and 16 of chapter 687 of the Laws of New York for the year 1892, known as the General Corporation Law; that the defendant is a foreign corporation organized under the laws of the State of New Jersey; that on or about November 24, 1896, the plaintiff and defendant entered into a contract in writing, whereby plaintiff agreed to manufacture for, and sell, furnish and deliver to defendant a freight elevator, etc., for use in certain premises of defendant at Nos. 131-137 Franklin street, in the city of New York, for $1,050, and said defendant, by and through its president and general manager, Thomas L. Marsalis, agreed that it would purchase said elevator and pay said sum of $1,050 therefor; that defendant broke said contract on December 27, 1896, and that that breach constitutes plaintiff's cause of action, whereby it seeks to recover damages therefor. The attachment was issued November 15, 1897.

At the Special Term, the judge vacated the attachment on the ground that the prohibition of the statute, section 15 of chapter 687 of the Laws of 1892, was absolute, and that no contract made in violation of it could be enforced.

Said section 15 reads as follows:

"§ 15. No foreign stock corporation other than a monied corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or, if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The

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secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. No such corporation now doing business in this state shall do business herein after December 31, 1892, without having procured such certificate from the secretary of state, but any lawful contract previously made by the corporation may be performed and enforced within the state subsequent to such date. No foreign stock corporation doing business in this state *without such certificate* shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate."

The Special Term judge, in holding as aforesaid, committed an error, because the inhibition operated upon the remedy only, and was removed as soon as the corporation obtained from the secretary of state the required certificate; and in this case the certificate was obtained before the commencement of the action. By virtue of the concluding clause of said section 15, a contract, although prohibited, might become nevertheless enforcible by an action when the certificate was procured. Neuchatel Asphalte Co. v. Mayor, 155 N. Y. 373; O'Rielly Co. v. Greene, 18 Misc. Rep. 423.

This error would require a reversal of the order.

The defendant also claims, that the moving affidavit was fatally defective in failing to aver, that the plaintiff has paid a license fee required by the tax laws of this state, section 1, chapter 240, Laws of 1895. The provision is as follows:

Section 1. "Every foreign corporation except banking, fire, marine, casualty and life insurance companies, and corporations wholly engaged in carrying on manufactures in this state, cooperative fraternal insurance companies, endowment orders and building and loan associations, now authorized to do business in this state, under the provisions of chapter six hundred and eighty-seven of the laws of eighteen hundred and ninety-two, entitled 'An act to amend the general corporation law,' shall pay to the state treasurer for the use of the state, *a license fee of one-eighth of one per centum* for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state, on the first day of December, eighteen hundred and ninety-five, to be computed upon the basis of the amount of capital stock employed by it within this state during the year preceding that date, and every such foreign corporation which shall hereafter be authorized to do business in this state shall pay a like license fee for the privilege, to be computed upon the basis of the

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capital stock employed by it within this state for its business during the first year of carrying on its business in this state. * * * No action shall be maintained or recovery had in any of the courts of this state by such foreign corporation doing business in this state, without obtaining the certificate of authority prescribed by law, and a receipt for the license fee hereby imposed."

The affidavit on which the attachment was granted shows affirmatively that the first business done by the plaintiff in this state was the contract which is the subject of the cause of action herein, which was made on November 24, 1896. The attachment was issued and this action commenced about November 15, 1897, which was within the thirteen months after plaintiff began business within this state (as provided by said statute), and plaintiff was, therefore, not liable to pay said tax at that time. The defendant seeks to invoke the rule of law "that presumptions cannot be indulged in to sustain an attachment because the facts necessary to sustain the attachment must be proved by the affidavit to the satisfaction of the judge granting the same. Ladenburg v. Commercial Bank, 87 Hun, 269. But the allegations in the affidavit in regard to the making of said contract of November 24, 1896, and the allegation that the plaintiff corporation has complied with all the requirements of law of the state of New York to authorize it to do business therein, are *prima facie* sufficient to entitle plaintiff to maintain this cause of action, and it becomes incumbent for the defendant to controvert those facts in its defense of this action. Lukens Iron & Steel Co. v. Payne, 13 App. Div. 11, 15.

The general rule is, that upon a motion to vacate an attachment, the court will not consider the merits of the action. The attachment will be held, unless the complaint and affidavits clearly indicate that the plaintiff must ultimately fail. In the case at bar, the complaint and affidavit sufficiently set forth a cause of action, and we do not feel warranted to vacate the attachment on that ground. Romeo v. Garofalo, 25 App. Div. 191.

The appellant claims, that, it appearing from the said affidavit, that the plaintiff corporation was organized eighteen months before the attachment; that its principal place of business was in the city of New York; and that the affiant, during all that time, had been its general manager, raises a presumption that the plaintiff was doing business prior to the making of the contract, to-wit, November 24, 1896. With this inference we do not agree.

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The appellant further claims, that the attachment papers are fatally defective in not showing either actual or apparent authority on the part of Marsalis, the defendant's president, to bind the defendant by the contract in suit. The affidavit, however, alleges that said Marsalis, the president of the defendant, as such entered into a contract with the plaintiff for a freight elevator for use in the defendant's buildings Nos. 131 to 137 Franklin street, in the city of New York, evidently to improve the business facilities of defendant's business. The president of a corporation, being its principal executive officer, is impliedly vested with authority to transact its ordinary business, and the corporation is liable for the contract so made by the president. Powers v. Schlicht Heat & Power Co., 23 App. Div. 380.

The point made by the appellant that the said affidavit is irregular, because no venue is stated, is untenable, because, it being an irregularity, the same must be specified in the notice of motion, which has not been done.

Order appealed from reversed, with costs, and motion to vacate attachment denied, with costs.

FITZSIMONS, Ch. J., and CONLAN, J., concur.

Order reversed, with costs, and motion to vacate attachment denied, with costs.

GEORGE W. McGILL, Respondent, *v.* HOLMES, BOOTH & HAYDENS, Appellant.

(City Court of New York, General Term, May, 1898.)

Action for a dividend — Defenses inconsistent with admissions of the answer — Counterclaim — Pledge — Status of a dividend declared.

The complaint in an action alleged, in substance, that the defendant was a foreign corporation and had declared a certain dividend to which the plaintiff, as a stockholder of record, was entitled but that, although demanded, the dividend had not been paid to him. The answer admitted these allegations. As defenses, it further alleged first, that when the dividend was declared the plaintiff was indebted to the corporation for loans and advances and that the dividends were "placed" by the defendant to the plaintiff's credit against the loans and advances; second, that there was and is, pending between the parties,

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an action for an accounting in regard to certain paper fasteners, which action involved the same issues; and, third, that while the stock was on the defendant's books and in the plaintiff's name he had pledged it to the defendant and that the plaintiff subsequently assigned the stock to his wife, subject to the pledge.

Held, that the first defense alleged no contract right of the defendant to apply the dividends to the loans and advances; and that the facts were not available as a counterclaim as none had been pleaded.

That, as to the second defense, the present cause of action was not involved in the prior action for an accounting.

That the third defense was unavailable, not only because no pledge was proved, but also because the defense was inconsistent with the prior admissions of the answer to the effect that the plaintiff owned the dividends.

That a dividend declared is, in legal contemplation, severed from the assets of the corporation and is thereafter held by it as a trustee of the person who was the stockholder at the time when the dividend was declared.

APPEAL from judgment, entered on a report of referee, appointed to hear and determine the issues herein.

Atwater & Cruikshank, for respondent.

Ward, Hayden & Satterlee, for appellant.

SCHUCHMAN, J. This action was brought to recover dividends, declared by the defendant corporation on its stock.

The complaint alleges that the defendant is a foreign corporation, organized and existing under the laws of the state of Connecticut; that its board of directors duly declared a dividend to stockholders of record on a day certain; that the plaintiff was a stockholder of record on that day to the extent of 500 shares of the capital stock of the defendant; that he was the owner of the dividends on the stock in his name; that they had not been paid; that payment had been duly demanded of defendant, and refused.

The answer admits all the allegations of fact contained in the complaint herein, and sets up the following matters as defenses:

First. That at the time of the declaration of the dividends, the plaintiff was indebted to the defendant in an amount greater than the dividends, for money loaned and advanced to him, and that

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"the said dividends were placed by the defendant to plaintiff's credit against said loans and advances on plaintiff's account."

Second. That, prior to the commencement of this action, there was pending and still is undetermined between the plaintiff and the defendant an action for an accounting of all their dealings and transactions under certain contracts for the manufacture and sale of McGill's paper fasteners, which involved the same issues as this action.

Third. That while said 500 shares of defendant's stock stood in the plaintiff's name upon the defendant's books, the plaintiff assigned 490 shares thereof to his wife, Mary L. H. McGill, by an assignment in writing, on February 20, 1894, and that the assignment was made subject to all claims of the defendant against the plaintiff, who had given the defendant said stock as security therefor.

As to the matters firstly above set forth, the learned referee held, and we think correctly, that there was no allegation in the answer of the existence of any contract right between the plaintiff and the defendant justifying the defendant applying the plaintiff's dividends to the payment of the alleged loans and advances, nor any equitable ground therefor, and that the facts could not be proved as a counterclaim, because no counterclaim was pleaded. Referee's Memorandum of Decision.

As to the defense secondly above set forth, the cause of action herein is not involved in the prior action for an accounting.

As to the matters thirdly above set forth, the assignment was made to Mrs. McGill on February 20, 1894, the dividends were declared in January, April and July, 1896, and in August, 1896, this action was commenced; and the answer to defendant's query, "how can plaintiff be entitled to said dividends, having assigned said stock to his wife?" is simply this,— your query is inconsistent with the admissions made by you in your answer.

The defendant's claim that the stock was pledged to it by the plaintiff, prior to the assignment thereof, by him to his wife and that the defendant as pledgee is entitled to the dividends, is answered by the fact that no such pledge has been proved; a mere recital thereof is contained in the assignment. Furthermore, this claim is again inconsistent with the specific admissions in the defendant's answer. When a dividend is declared, it belongs to the owner of the stock at that time. The declaration of the dividend is, in legal contemplation, a separation of the amount thereof

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from the assets of the corporation, which holds such amount thereafter as the trustee of the stockholder at the time of the declaration of the dividend. Hooper v. Sage, 21 N. Y. St. Repr. 491.

We have examined all the exceptions in the case, and none present reversible error.

Judgment affirmed, with costs.

FITZSIMONS, Ch. J., and CONLAN, J., concur.

Judgment affirmed, with costs.

ISABELLA F. McKNIGHT, as Admx., Etc., Plaintiff, *v.* THE BROOKLYN HEIGHTS RAILROAD CO., Defendant.

(Supreme Court, Kings Trial Term, May, 1898.)

Action for the death of a street car driver, killed by the breaking of defective harness — His duty to inspect the harness — When the master's duty of inspection cannot be delegated.

The lower hamestrap of the harness of a street car horse broke in its crease on the ring or eye of the hame where it had become worn and cracked on the inside, the freed harness then slipped off the back of the horse, he pulled the driver over the dashboard to the ground by means of the lines and the driver was then run over and killed by the car. The "head changer" of the corporation who operated the car, and his assistants were charged with the duty of inspecting the harness in detail and there was an ample supply of new hamestraps on hand. A rule of the corporation read "They (drivers) will also examine the harness"; but horses were brought to the cars harnessed and drivers started off at once or very soon. In an action brought against the corporation by the administratrix of the driver, to recover damages for his death, the jury found that, had the "head changer" and his assistants done their duty, they could not have missed the defect, but further found that, in the short time given the driver for inspection, he could not be expected to have seen it; it apparently not being visible when the harness was on the horse and the hamestrap buckled tight.

Held, that the contributory negligence of the driver was properly submitted to the jury, as the question of the extent of the examination of the harness which it was possible for him to make in the short time allotted to him, was one of fact.

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That the corporation could not delegate the duty of inspection to the "head changer" and his assistants, although competent persons, and that, as the jury had found that that duty had not been properly performed, the corporation was liable; and that the doctrine of the negligence of fellow servants had no application to such a state of facts.

MOTION to set aside a verdict for the plaintiff, and to dismiss the complaint on all the evidence, the verdict having been taken by consent subject to such a disposition of the case. The action was for damages for negligence.

While the plaintiff's intestate was driving a single horse to one of defendant's street cars, the harness slipped back off the horse by the breaking of the lower hamestrap, and thus freed, the horse pulled the deceased over the dashboard to the ground by the lines, where he was run over and killed by the car. The strap broke in its crease on the ring or eye of the hame. It was worn and cracked at that point on the inside, from wear on such ring or eye. The defect could be seen upon an inspection of the harness in detail when off the horse, but it was a question of fact whether it was visible when the harness was on the horse, and the strap buckled up tight. The horses were brought out to the drivers harnessed by the stablemen, and ready to start off at once or very soon. The "head changer" of horses, and his assistants in the stable, were charged with the duty of cleaning and oiling the harness, and making inspection thereof in detail in the stable, and the defendant kept on hand all the time an ample supply of spare new hamestraps. They were in the custody of the "head changer", locked in a closet, and his duty was to give them out as they were called for, and as they became necessary to replace old straps. He was authorized to be the judge of such necessity in each case if he chose not to take the word of others. Printed rules of the company had long been promulgated and established, and furnished to each driver and conductor. One of the rules set down for drivers was as follows: "Drivers must examine the feet of horses before leaving the depot to ascertain if any shoes are loose, in which case they must require the same to be tightened before starting. They will also examine the harness."

C. J. Patterson, for plaintiff.

Thos. L. Hughes, for defendant.

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GAYNOR J.: How much of an examination of the harness could be made by the drivers was a question of fact. They were not by the company's rule made responsible for the consequences to themselves of all defects in the harness, but only of such defects as the said rule contemplated, viz., such as could with reasonable care be found by such an examination as they were given opportunity to make. The master cannot shift upon his employes his responsibility for injuries to them from defects in appliances from wear and tear, by devolving on them the duty of inspection, without giving them time and opportunity to make such inspection as would reveal the defects. In this way the question of the negligence of the deceased was properly submitted to the jury. It is true there was a supply of new hamestraps on hand, and that the drivers could call for them, and in that respect the case is like that of *Cregan* v. *Marston* (126 N. Y. 568); but it is unlike that case in that thorough inspection was necessary, but the drivers were not given by the master opportunity for thorough inspection, but only for a cursory or general inspection. Hence, their contract of service did not require them to make, and be responsible for the consequences to themselves of not making, a thorough inspection. The duty of a particular inspection in detail, was specially devolved upon the head changer and his assistants in the stable. The jury have found that the latter could not miss noticing the defect from wear in the hamestrap, if they had carefully inspected the strap while it was unbuckled, as was their duty to do, but that a driver could not be expected to see such a defect with the exercise of due care under the limited conditions of inspection allowed to him.

The only question left in the case, therefore, is whether the negligence of the head changer and his men, which has been found by the jury, was in law the negligence of the master, or only of fellow servants of the deceased.

The first mention I find in this state of the law of negligence of fellow servants is in 1844 in *Brown* v. *Maxwell* (6 Hill, 592), and the next is in 1849 in *Coon* v. *Syracuse and U. R. R. Co.* (6 Barb. 231; 5 N. Y. 492). It seems to me that it is more difficult now for a trial judge to apply the rule to a given case than it was then.

The rule is that a master must use reasonable care to provide his servants with safe machines and appliances in their work, and then that he must continue to use reasonable care by oversight and inspection to keep them safe, unless such oversight and inspection

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belong, by virtue of their contract of service, impliedly or expressly, to the servants using them.

This being the duty of the master in respect of oversight and inspection, what amounts to a discharge of it? Manifestly, the rule must be held to be either that by employing competent fellow servants for such oversight and inspection, the master discharges his said duty in full, or else that his said duty is not discharged unless such fellow servants actually exercise such oversight and inspection with reasonable care. Either the master's said duty of reasonable care is fulfilled by his employment of such competent servants, or it is not. In the former case, their negligence would not be his; in the latter case, it would be. I suppose a trial judge may say with due submission that it seems to him that the reported decisions in this state vacillate between these two propositions.

In the case at bar, the defendant did employ suitable servants to inspect the harness in detail in the stable. Is that all that its duty of reasonable care required of it, or is their negligence its negligence?

The conflict of the cases upon this question may be illustrated by the citation of a few of the leading ones on each side.

In *Kirkpatrick* v. *N. Y. C. & H. R. R. R. Co.* (79 N. Y. 240), and *Fuller* v. *Jewett* (80 N. Y. 46), it is held that the negligence of servants of a railroad company, whose duty it is to inspect and repair the engines from day to day, is not the negligence of fellow servants, but of the master, in respect of the engineers.

In *Bailey* v. *Rome, W. & O. R. R. Co.* (139 N. Y. 302), the same is held of car inspectors from station to station, in relation to the brakemen. This is an obscure case as reported. The rule of the company quoted in the opinion puts the duty of inspection upon the conductor and "the men". If this means the trainmen, how could the plaintiff, who was a brakeman, recover?

In *Woods* v. *Long I. R. R. Co.* (11 App. Div. 16), an expressman employed by the defendant was hurt in his express car by reason of the violent impact with it of another car which was moving up to be coupled with it. The cause was that the brake of the moving car was defective from lack of inspection. The duty of inspection was not upon the train hands, but upon car inspectors. I understand the opinion to say that if the duty of inspecting and adjusting the brakes had been upon the train hands, the plaintiff could not recover, as their negligence would be to him that of fellow servants, and not of the master; but that the negligence of

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the other set of servants upon whom the duty was put, was not to him that of fellow servants, but of the master. As the plaintiff had nothing to do either with the operation of trains, or with the inspection of cars, and therefore belonged no more to the one set than to the other, I do not for the moment perceive the ground for this distinction. But what is to the purpose is the decision that the negligence of the inspectors was that of the master.

In *Galasso* v. *National Steamship Co.* (27 App. Div. 169), it is held in respect of wear and tear to the catch of a bucket used in hoisting chalk from the hold of a ship, that the defendant did not fulfil its duty by employing a servant to "make all necessary repairs." "It could not delegate its duty to keep its apparatus safe", says the court.

The decisions of which the foregoing are typical, necessarily rest upon the proposition that the master does not fulfil his said duty of reasonable care by oversight and inspection, and discharge himself from liability thereunder, by employing competent servants to do that service, but that on the contrary his said duty still continues through them, and their negligence therein is his negligence.

And now let it suffice to cite a few decisions from those arrayed on the other side.

In *Malone* v. *Hathaway* (64 N. Y. 5), by the giving way of decayed wooden joists which supported a mash tub in the defendant's brewery, a workman in the brewery was killed. The defendant had a competent carpenter employed in the brewery all the time to keep the fixtures and appliances in a safe condition. It was held that negligence by him in that duty would be that of a fellow servant, and not of the master. The brief opinion of the two able dissenting judges helps to make the point precise. The case was sent to the jury on the question whether there was any negligence by the carpenter, with the instruction that his negligence would be that of the master, and for this the judgment for the plaintiff was reversed.

In *Webber* v. *Piper* (109 N. Y. 496), the plaintiff while working in the defendant's factory was injured by one of the circular saws by reason of its dullness which made it dangerous. There were present for use duplicate saws, and there was an employee whose duty it was to change the saws as they grew dull, and to set and sharpen those taken out. By his neglect to repair the particular saw at the request of the plaintiff, the latter was hurt. The court

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said that "the master's duty was performed when he furnished suitable saws and the means and conveniences for keeping them sharp and properly set", and that "the negligence, if any, was that of Myers, whose duty in sharpening and setting the saws was that of a fellow servant."

In *Schulz* v. *Rohe* (149 N. Y. 132), it is held that the negligence of "an engineer, employed for the purpose of keeping the machines in a manufacturing establishment in order", in failing to repair, is the negligence of a fellow servant, and not of the master, in relation to the servants who operate the machines.

The foregoing sets of cases serve to mark the conflict in the decisions.

The notion that the rule varies according to the complexity of the machine or appliance to be inspected, is without any foundation whatever. The rule ceases when the machine or appliance is so simple that it needs no inspection other than that of the servant who uses it, or in any case when the duty of inspection is expressly upon him by the contract of service.

Nor have I any notion that it can be suggested that there is, or can be upon principle, one rule on this head for steam railroads, and another for other employments. If the negligence of mechanics employed by the common master to inspect and keep safe the machines in a factory, is the negligence of fellow servants in relation to those who operate them, why is not the same the case between those employed to inspect and keep safe locomotive engines or cars, and the engineers or brakemen who run them?

There are other cases which are sometimes cited in the controversy, but which seem to have in fact no bearing upon it whatever. In *Crispin* v. *Babbitt* (81 N. Y. 516), the negligence of the fellow servant was not in the performance of any duty due from the master to the servant. It was the negligent act of a servant for which the master could be liable to the person hurt only under the rule of *respondeat superior*, which has no application to the question of negligence between master and servant. It relates only to injuries to a stranger by a servant. The same was the case in *Cullen* v. *Norton* (126 N. Y. 1) and *Loughlin* v. *State* (105 N. Y. 159). The negligence of the fellow servant was in the doing of the details of the very work the servants were all engaged in, and not in the fulfilling of any duty of the master to the servants in respect of the materials or appliances. This is also obvious in *Soderman* v. *Kemp* (145 N. Y. 427). In *Cregan* v. *Marston*

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(126 N. Y. 568), in hoisting buckets of coal from the hold of a ship to the dock, the rope called a fall broke. A fall in such use wears out in a short time. For that reason the master had at hand for the use of the servants a supply of spare falls, and it was the duty of each and every of them to see that new falls were substituted as it became necessary. Their neglect to do so was not his negligence. In the scaffold cases (*Butler* v. *Townsend*, 126 N. Y. 105; *Judson* v. *Village of Olean*, 116 N. Y. 655), the master did not build the scaffold, but the building of it was a detail of the work of the servants themselves. It was a part of their work to build it for their own use. The master was no more liable for their negligence to one another in building it, than he would be if they negligently dropped tools, or hods, or bricks, or boards on one another. On the other hand (and to show the distinction), in *Benzing* v. *Steinway* (101 N. Y. 547), the servants did not construct the platform or skid which broke, but the master furnished it to them ready made (p. 553). It is to be assumed that the decision was based upon this fact, rather than the general statements of the opinion.

In the case at bar, it seems to me that it is common knowledge that there are certain defects from wear and tear in the straps, buckles and fastenings of a harness which may not be discovered with the exercise of reasonable care when it is upon a horse, especially by a cursory or limited examination; and the jury have so found. It is an adage that no horseman should get into a saddle which he has not himself buckled on. It follows that the master owed to the drivers the duty of reasonable care in the inspection of harness in the stable. In pursuance of this duty it employed competent servants to make such inspection. That did not fulfil its said duty, but still left it responsible for the actual making of such inspection, and liable to the drivers for any negligence of its said other servants in the making thereof.

The motion to set aside the verdict is denied.

Motion denied.

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MAX GABRIEL et al., Plaintiffs, v. THE SICILIAN ASPHALT PAVING CO., Defendant.

(Supreme Court, New York Special Term, May, 1898.)

Trade-marks — When a geographical designation cannot be made the subject of an exclusive use.

In an action brought to restrain the defendant from the use of the name "Brunswick" in the manufacture or sale of rock asphalt, it appeared that the plaintiff's asphalt was manufactured in cylindrical cakes at Eschershausen in the Duchy of Brunswick, Germany, and was sold under the brand "Brunswick G. & S. Germany," while the defendant's asphalt was manufactured in the city of New York upon a basis of 80 per cent. of rock asphalt, which had been quarried from one of numerous similar deposits in or near Eschershausen.

Held, that the complaint was properly dismissed.

That where the great element of the value of the manufactured article consisted in the locality of the principal material of which the article was composed, the geographical designation of the locality from which that principal material was derived might be used by another dealer. That as a general rule a geographical designation could not become the subject of proprietary use as a trade-mark, but that courts would interfere where the use was deceptive as to the locality of the basic production, or where the value of the designation consisted in identifying the things sold as valuable because of the well-known quality of the thing manufactured.

ACTION for an injunction to restrain the use of a trade-mark.

George S. Hastings, for plaintiffs.

Joseph Fettretch, for defendant.

RUSSELL, J. The plaintiffs seek to restrain the defendant from the use of the name "Brunswick," in the manufacture or sale of rock asphalt. The plaintiffs' asphalt is manufactured in the form of cylindrical cakes at Eschershausen in the duchy of Brunswick, Germany. The defendant's asphalt is manufactured at New York city from a basis of 80 per cent. rock asphalt, quarried from one of the several deposits in or near Eschershausen, and is sold by the

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defendant as "Brunswick Rock Asphalt." The brand of the plaintiffs is "Brunswick G. & S. Germany."

Ordinarily a geographical designation is not the subject of proprietary use as a trade-mark, but may be claimed as such where specially equitable reasons exist for such claim. Montgomery v. Thompson, House of Lords, 64 Law Times (N. S.), 748; Anheuser Busch Brewing Co. v. Piza, 24 Fed. Repr. 149.

In the first of these cases the use of the term "Stone Ale" was enjoined, as the plaintiffs for over a century had brewed ale, sold by this designation, at Stone, England. In the second case cited, the United States Circuit Court enjoined the use of the term "St. Louis Beer," as the plaintiff had acquired a valuable trade for its beer, sold under the name of "St. Louis Lager Beer."

In both of these cases, however, the product manufactured was the combination of several common ingredients rendered valuable as a whole by the process of manufacture.

In the case of Newman v. Alvord, 51 N. Y. 189, it appeared that the plaintiffs had acquired a valuable good will from the manufacture of cement or water lime, from stone taken from quarries near Akron in the county of Erie in this State, which they sold in the market as "Akron" cement. The defendants manufactured their cement from stone quarried near Syracuse and sold it as "Alvord's Onondaga Akron Cement," or water lime manufactured at Syracuse, New York. An injunction was sustained against the use of the term "Akron," as it was plainly deceptive, for the plain import and value of the word "Akron" was to designate the locality of the basis of the production.

It is needless to cite other cases to show that the deceptive use of a geographical term is unlawful. It may be restrained where the value of the term applies to a well-earned good will in the manufacture, and consists in identifying the thing sold as valuable from the well-known quality of the thing manufactured; and also where a false use is made of the name of the locality of the basic production.

But how can any one acquire a right to the exclusive use of the name of an entire duchy, principality, kingdom or state, for the sale of a production four-fifths of the value of which depends upon the locality of the basis of the thing sold, and where there are numerous deposits separately used by different companies for the acquiring of the basic commodity? It is not suggested that other products manufactured wholly within the duchy of Brunswick, may not be sold as Brunswick asphalt or mastic. Can it be said

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that an advertisement is misleading which states that the thing sold is Brunswick asphalt or mastic when four-fifths of the composition is the commodity taken from the quarries within the duchy of Brunswick, when it is well known that the principal value of the finished product is derived from this fact, and it is also well known that a small percentage of other materials has to be used to put the asphalt into a suitable condition for laying into walks or pavements? I am of the opinion that in all cases where the great element of value of the manufactured article consists in the locality of the principal material of which it is composed, the geopraphical designation of the locality from which that principal material comes may be used. Otherwise the freedom of manufacture and commerce would be seriously disturbed by the enforcement of a monopoly in the use of the term designating the place from where the material comes, and competition would not be left open for the growth of a good will dependent upon the value of the thing sold.

The complaint is, therefore, dismissed, with costs.

Complaint dismissed, with costs.

HENRY W. SPANG, Plaintiff, *v.* STEPHEN Y. PATTERSON, et al., Defendants.

(Supreme Court, New York Trial Term, May, 1898.)

Order of arrest — Liability of sureties for the defendant's loss of earnings while in jail.

Sureties upon an undertaking, given in an action by the plaintiff to procure an order of arrest, are liable to the arrested defendant for his loss of earnings for forty-two days, during which period he was unjustly incarcerated by virtue of the order, as such a loss is a proper element of the damages which the defendant "might sustain by reason of the arrest," within the meaning of the undertaking.

ACTION upon an undertaking given to procure an order of arrest.

Lexow, Mackellar & Wells, for plaintiff.

Campbell & Hann, for defendants.

SCOTT, J. The plaintiff in this action was arrested in an action brought against him by one Reigner. Upon the issue of the order

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of arrest, the defendants executed an undertaking in the usual form, whereby they undertook that if the said Spang should recover judgment in the action against him, or if it should finally be decided that the plaintiff in said action was not entitled to an order of arrest, then they, the sureties on the undertaking and defendants in this action, would pay all costs which might be awarded to said Spang, and all damages which he might sustain by reason of the arrest, not exceeding the sum of $500. The undertaking having been duly approved, Spang was arrested by the sheriff, and actually incarcerated for the period of forty-two days. The action finally went in his favor and he recovered a judgment for costs against the plaintiff Reigner for the sum of $320.22, no part of which has been paid to him. The defendants conceded upon the trial their liability to pay the judgment for costs, and offered no evidence to show that the whole amount thereof did not directly accrue from the arrest or from proceedings necessitated by the arrest. The only question litigated upon the trial was, whether or not the plaintiff's right to a recovery was limited to such costs and interest thereon, or whether the plaintiff might recover such other damages as he appears to have suffered. It was said by the General Term of this court that such an undertaking as forms the basis of this action "is designed to cover taxable costs and such other legitimate damages as flow from the arrest and are made necessary by it, such as counsel fees and expense in moving to vacate the arrest, and loss of time occasioned the arrested party in getting bail and in and about moving for his discharge." Bamberger v. Kahn, 6 N. Y. St. Repr. 707. It is well settled that the plaintiff in an action like the present cannot recover the same damages, or damages estimated upon the same basis, as can be recovered by a plaintiff suing for false imprisonment, but the authorities seem to hold that he may recover all damages, not exceeding the amount of the undertaking, which naturally and necessarily result directly from the issuance and enforcement of the order of arrest. In the present case the plaintiff was actually confined in jail for forty-two days. At the time of his arrest, and for some time prior thereto, he had been earning by his own exertions about $25 a week, and during the period of his imprisonment, and as a direct result thereof, he was prevented from earning this sum or any sum whatever. I think that this loss was clearly a damage resulting directly from the issuance and enforcement of the order of arrest. The undertaking was for $500. The judgment for costs, liability for which is conceded, with interest, amounts to

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$361.34. I think that the difference between these two sums ($138.66) is well within the actual damages suffered by plaintiff. I, therefore, direct a judgment for the plaintiff for the sum of $500, with costs.

Judgment for plaintiff, with costs.

Matter of the Judicial Settlement of the Account of BENJAMIN C. HARDENBROOK and Others, as Executors and Trustees under the Last Will and Testament of WILLIAM GRAY, Deceased.

(Surrogate's Court, Rockland County, May, 1898.)

Will — Equitable conversion — Executors' commissions on realty as personalty.

A will by its second clause devised the testator's residuary estate to his executors in trust, gave them a power of sale to be exercised "at such time and for such consideration as they may deem proper" and, until exercised, directed them to hold, let, rent or mortgage the same, collect the rents, issues and profits and apply and dispose of the principal and income as thereinafter provided. The third clause created a trust in a specific sum, which amount had been made from the personalty. The fourth clause directed his executors and trustees to invest and reinvest three-eighths of his estate and apply its rents and income to the use of his widow for life or until remarriage and, in the latter event, "to assign, transfer and pay over two-thirds of the aforesaid three-eighths of my estate or the proceeds thereof, to her children Lillian and William equally, share and share alike." Similar trusts were then created for children of the testator by a former wife. The eighth clause permitted the trustees, in the case of any trust, to "retain any seceurities or property belonging to my estate, as an investment of the whole or any part of the principal of the trust." The eleventh clause authorized the trustees "to sell, lease or mortgage the whole or any part of the real estate that may come into their hands."

Held, upon a consideration of the entire will, that it contained no mandatory power of sale and, therefore, worked no equitable conversion; and that consequently the executors were not entitled to have the unsold real estate regarded as personalty for the purpose of estimating their commissions.

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Misc.] Surrogate's Court, Rockland County, May, 1898.

JUDICIAL settlement of the accounts of executors and trustees.

Fletcher, McCutchen & Brown, for executors and trustees.

Ernest A. Bigelow, for contestants.

TOMPKINS, S. The three executors and trustees unite in an account, and on the settlement thereof have asked for three full commissions, claiming that the value of the personal property exceeded $100,000 over all his debts. This claim is disputed by two of the parties interested, who deny that the personal property equaled the sum of $100,000.

The inventory of the personal estate, made by the executors and filed in the surrogate's office on the 20th day of January, 1898, fixed the value of the property thereby inventoried and appraised at the sum of $18,983.09. In their account the executors charge themselves with this amount together with the sum of $389.64 increase, making the total value of the personal property (distinct and apart from the real estate and income therefrom) received and accounted for by them, the sum of $19,372.73.

The executors further charge themselves with the sum of $4,000, the proceeds from the sale, by them, of real estate, making the total of the personal property and proceeds from the real estate the sum of $23,372.73.

In addition to this amount the executors have received as income from the real estate, which has not been sold, the sum of $20,954.54.

It is seen that so far as the property, commonly denominated "personal property," and the income actually received goes, the value is far less than $100,000. But it is contended by the executors that the testator's will worked an equitable conversion of the real estate, and that it should be regarded as personal estate, and the value thereof added to the above amounts, which would make the total value of the estate $115,817.27.

After directing the payment of the testator's debts, etc., he devises and bequeaths unto his executors "all the rest, residue and remainder of my estate, real, personal and mixed of every name and nature * * * with the rents, issues and profits and increase thereof, in trust, nevertheless, to sell, assign and convey the same at public sale or by private contract at such time and for such consideration as they may deem proper, and until such sale, to hold,

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let and rent or mortgage the same, and to collect the rents, issues and profits thereof and to dispose of the said principal and income as hereinafter provided.

"Third. To set apart and invest, reinvest and keep invested the sum of $7,000 at interest, and to collect and receive the interest and income arising therefrom, and to pay over and apply so much of the net proceeds thereof as shall be necessary for the maintenance and support of my daughter Rebecca, during her natural life, and upon her death to pay over the principal as directed by the residuary clause of this my will."

The fourth clause of the will provides as follows:

"Upon the further trust to invest, reinvest and keep invested at rentals or interest, the equal undivided three-eighths of my net estate, and to collect and receive the rents, interest and income arising therefrom, and to pay over and apply the net proceeds thereof to and for the use of my beloved wife, Harriet, during her natural life or until her remarriage, and upon her remarriage to assign, transfer and pay over two-thirds of the aforesaid three-eighths of my estate or the proceeds thereof, to her children Lillian and William equally, share and share alike."

Other similar trusts are created by the following provisions of the will for the benefit of other children of the testator by a former wife, and by the eighth paragraph of his will the testator makes the following provision:

"It is my will, in respect to all the aforesaid trusts, that my said trustees and the survivor and survivors of them, will, in their discretion, retain any securities or property belonging to my estate as an investment of the whole or any part of the principal of the trust."

The eleventh paragraph of the will authorizes and empowers the trustees "to sell, lease or mortgage the whole or any part of the real estate that may come into their hands."

I have concluded that there is no imperative direction to the executors to sell the real estate and hence that there was no equitable conversion.

"To constitute a conversion of real estate into personal in the absence of actual sale, it must be made the duty of and obligatory upon the trustees to sell it in any event. Such conversion rests upon the principle that equity considers that as done which ought to have been done. A mere discretionary power of selling, produces no such result." White v. Howard, 46 N. Y. 144; Stagg v. Jackson, 1 id. 206.

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While the will clearly creates trusts in favor of the persons named therein — and while for convenient division, control and management of the several trusts, the executors were given power, and in the first clause of the will are directed to sell, etc., the phraseology of the whole instrument does not import an absolute and positive direction so to do. And the provisions of the will and the several trusts created thereby have and can be carried out and discharged without the sale of all, or any particular portion of the real estate.

In the paragraph of the instrument by which the devise is made to the executors, and in which the direction to sell is contained, we find this provision: "At such times and for such consideration as they may deem proper, and until such sale to hold, let and rent or mortgage the same, and to collect the rents, issues, income, dividends and profits thereof," etc., leaving entirely to the discretion of the executors the time when an actual conversion should take place, and unless some other provision of the will makes a sale necessary, leaving it in the discretion of the executors to determine whether the power should ever be exercised or not.

The will considered in the case of Scholle v. Scholle, 113 N. Y. 261, is quite analogous to the one in question. There the residuary clause was as follows:

"Fifthly, I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, unto my executrix and executors hereinafter named, and the survivors and survivor of them in trust, with power to receive the rents and profits of the same and to sell, dispose of and convey the same at such time or times, and in such manner as to them shall seem proper and best for the interest of my estate, and to invest and keep invested such rents and profits and the proceeds of such sale or sales * * * and to apply and divide the same and the income thereof as hereinafter directed.

"Sixthly, I give and bequeath, and I hereby authorize and direct my said executrix and executors to apply the income of two-sixths part of said residue and remainder of my estate semi-annually to the use of my said wife Sarah E., for and during the term of her natural life, and after her death I give, devise and bequeath the said two-sixths parts of said residue and remainder of my estate unto my children living at the time of her decease, and unto the lawful issue of any deceased child or children to be divided equally, share and share alike, *per stirpes* and not *per*

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capita, among such children and issue, the issue of my deceased child to have the share the parent would have been entitled to if living."

The remaining clauses of the will were similar to the sixth.

It was held that there was no conversion, because the power of sale "was to be exercised or not as the judgment of the executors may dictate."

Judge Finch writing the opinion of the court says: "To justify such a conversion there must be a positive direction to convert, which, though not expressed, may be implied; but in the latter case, only when the design and purpose of the testator is unequivocal and the implication so strong as to leave no substantial doubt (Hobson v. Hale, 95 N. Y. 598). Where, however, only a power of sale is given without explicit and imperative direction for its exercise, and the intention of the testator in the disposition of his estate can be carried out, although no conversion is adjudged, the land will pass as such and not be changed into personalty."

A conversion of the realty does not seem essential to the carrying out of the testator's intention.

The personalty was sufficient, after the payment of the debts and expenses, to provide for the fund of $7,000, directed by the third clause of the will, which is the only fund of that character created by the will.

The will in brief bequeaths and devises the entire estate to the executors in trust. During the life of the widow, she was to have three-eighths of the rents, the balance to go for the use of the children; on her death, two-thirds of three-eighths of the estate or the proceeds thereof, "to be transferred or assigned to her children Lillian and William." The words, "to assign, transfer and pay over two-thirds of the aforesaid three-eighths of my estate, or the *proceeds thereof* to her children Lillian and William equally," clearly indicate that the testator intended to provide that the two-thirds of the three-eighths of his estate, set apart as aforesaid, should go to these two children, in whatever form it might be at the time of the death of the widow, whether the realty had been previously converted into personalty or not, and it negatives the proposition that he intended and directed a conversion of the realty before the death of his widow.

In the seventh clause, the testator refers to the "devises and bequests" to his children Lillian and William which demonstrates that he contemplated a taking by them of real estate by

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devise as well as personal property. Again, the executors are directed by the fifth clause "invest, reinvest *and keep* invested *at rental* or interest the equal undivided three-eighths * * * and to collect and receive the rents" clearly showing that they were to retain, or at least had the right and option of retaining, as a part at least of the principal of the several trusts the real estate as it existed at the time of the testator's death, because under the eighth clause of the will they are restricted in their investments to first mortgages and other securities.

By the eleventh clause the executors are given power "to sell, lease or mortgage the whole or any part of the estate." Such authority was unnecessary, if by the second provision of his will the testator has accomplished an equitable conversion. Certainly the power to lease or mortgage seems inconsistent with a preceding positive direction to sell and convert into cash.

There has been no sale of the real property except one parcel sold for $4,000, and the bulk of the estate is still unconverted and being rented, and the rents therefrom being collected by the executors and trustees, although the widow has been dead for some months, and when we read the eighth clause of the will, which expressly authorizes the trustee to "retain any securities or property belonging to my estate as an investment of the whole or any part of the principal of the trust," the conclusion seems irresistible that there is not such a positive direction to sell as to constitute an equitable conversion, or that the general scope of the will is such that a conversion of the real estate is necessary to the execution of the trusts.

The executors and trustees are, therefore, not entitled to full commissions.

Two proposed decrees have been submitted, differing in several particulars, and inasmuch as I have here only considered the principal question, I will hear counsel on the settlement of the decree.

Decreed accordingly.

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EDGAR H. SMITH, Respondent, *v.* CHARLES BURLISS, Appellant.

(County Court, Oswego County, May, 1898.)

Justice's Court — Jurisdiction — The plaintiff, although a town constable, cannot serve a summons in his own action.

The provisions of sections 425 and 3157 of the Code of Civil Procedure forbid a party to an action to serve the summons in it and where the summons in an action in a Justice's Court is served by the plaintiff, although a town constable, the justice acquires no jurisdiction.

APPEAL from a judgment of a Justice's Court, in favor of respondent.

O. M. Reilly, for appellant.

F. G. Spencer, for respondent.

STOWELL, J. Appeal from a judgment in favor of the respondent and against the appellant, in Justice's Court.

There is only one question in this case. It was conceded upon the argument that the plaintiff served the summons upon the defendant, the plaintiff being at the time a duly elected constable of the town of Schroeppel, and the justice's return shows the same.

It is claimed by the appellant that the justice acquired no jurisdiction by such service.

The respondent contends that, under the authority of Tuttle v. Hunt, 2 Cow. 436, and Putnam v. Man, 3 Wend. 202, jurisdiction was acquired.

Tuttle v. Hunt seems to have been decided upon the authority of Bennet v. Fuller, 4 Johns. 486; and Putnam v. Man was decided upon the same authority as that of Tuttle v. Hunt. An examination of Bennet v. Fuller shows it to have been decided upon the grounds, that "The practice of deputing the plaintiff to serve his own writ has been of long duration," and, therefore, it would be going too far to say that the plaintiff could not, in any case, serve a writ in his own favor.

Section 3156 of the Code, however, expressly prohibits a party to the action being deputized to serve a mandate in that action.

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If the practice which formerly prevailed has been expressly prohibited, it seems to me that the rule deduced from that practice must also be considered as abrogated.

I believe it to be the plain intent of the Code, that no person who is a party to an action shall serve a summons in that action. Code of Civil Procedure, §§ 425, 3156; Warring v. Keeler, 11 Misc. Rep. 451; Decker v. Ekelman, 17 id. 665.

The judgment should be reversed, upon the ground that no jurisdiction was acquired by the service of the summons.

Judgment reversed, with costs.

THE PEOPLE ex rel. THE BROOKLYN YOUNG MEN'S CHRISTIAN ASSOCIATION, Relator, *v.* THEODORE B. WILLIS, as Commissioner of Public Works, etc., Respondent.

(Supreme Court, Kings Special Term, May, 1898.)

Taxation — An exemption to "hospitals, orphan asylums and all other charitable and benevolent corporations," etc., does not exempt a young men's christian association.

The provisions of the charter of the city of Brooklyn, exempting from the payment of water rates "The several hospitals, orphan asylums and all other charitable and benevolent corporations, associations and institutions," existing or thereafter established in the city, do not exempt the Brooklyn Young Men's Christian Association from such payment, as it is the purpose of the statute to exempt only such charitable and benevolent corporations as are similar in character to hospitals and orphan asylums.

CERTIORARI to review the determination of the commissioner of public works as to the exemption of a Young Men's Christian association from the payment of water rates.

Henry Yonge, for relator.

William J. Carr, for respondent.

JOHNSON, J. The question in this case is whether or not the Young Men's Christian Association is liable to pay for the water furnished to it in the ordinary way by the city of Brooklyn. Exemption is claimed under the provisions of section 33, title XXII, of the charter of the city of Brooklyn, which provides that "The sev-

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eral hospitals, orphan asylums and all other charitable and benevolent corporations, societies and institutions now existing in the city of Brooklyn or which hereafter may be established therein," are exempt from the payment for water, etc. There can be no question that the Young Men's Christian Association is an association incorporated for charitable work, as charity is understood and defined in the law. Not only is its work charitable, but it is benevolent and undoubtedly in the highest degree, commendable and beneficial. But the question is: Is that institution within the statute?

It is contended that it is, because it is a benevolent and charitable corporation. If that statement carries with it that effect, then the words "hospitals and orphan asylums" are surplusage, and the section would mean exactly the same if it had stated that all charitable and benevolent corporations in the city of Brooklyn are relieved from the charge of water. We are not allowed to construe the statute so as to make any part surplusage. The words "hospitals and orphan asylums" must be given some effect, and a part of that effect, under the rule laid down in Hickey v. Taaffe, 99 N. Y. 204, is that such specific words must be construed in some way to characterize or limit the general words that follow, as though the language were "and all other *similar* charitable and benevolent corporations."

Besides it is a well-settled rule and familiar that one who claims exemption from common burdens must establish the exemption clearly, and construction will incline against giving such an effect. Taking this altogether, I think the application must fail.

Hospitals and orphan asylums, in some degree, do the work that the public would otherwise be compelled to do in the support and care of the helpless poor.

This relator undoubtedly does work beneficial to the public, but not a work which the public necessarily is compelled to do; at least, not a work that relieves its treasury, as does the care of the sick and the orphan. I think the exemption necessarily would be extended to all institutions that, as a matter of charity, take and care for the helpless in the community. A lunatic asylum, an asylum for the blind, a home for inebriates would very possibly be within that class. This statement is made not to determine whether such institutions would be within the class, but to indicate that a meaning can be given to the general words of the section which is in entire harmony with the specific words and which is yet in accordance with the conclusion here reached.

The motion must be denied.

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JOSEPH BROWER PEIRSON et al., Plaintiffs, *v.* CHARLES VAN BERGEN et al., Defendants.

(Supreme Court, New York Special Term, May, 1898.)

Petition by a remainderman — Consent of the holders of particular estates to a sale — An existing express trust — Effect of a voluntary existing express trust.

A testatrix devised to trustees one equal share of her residuary real and personal estate "upon trust for my said son Joseph R. Peirson for his life, with remainder for Susan, his wife, for her life, with remainder for their children or child living to attain the age of twenty-one years, and if more than one equally share and share alike as tenants in common. And in default of any such children or child then the said share so intended for the benefit of my said son Joseph Robert Peirson and his wife and their children or child shall be held by my said trustees for the benefit of my said daughter Julia Augusta Van Bergen and her husband or children or child as if the same were included in the share hereinafter provided for my said daughter and her husband and children or child." She devised another third for the benefit of her daughter Julia Augusta Van Bergen to the same trustees and upon the same conditions and the remaining third, for the benefit of another person, upon a similar trust; a disposition subsequently cut off by her and this share directed to take the same course as the other two shares. Her son and his wife and the husband of her daughter are living. In an action of partition brought by a remainderman, the son of Joseph R. Peirson,

Held, that the will created a valid express trust to receive the rents and profits and apply them to the use of the beneficiaries named.

That as three of the beneficiaries were living, the trust still existed and hence the trustees, as holders of the particular estates, had no power to give the written consents to a sale in the action which are required, by section 1533 of the Code of Civil Procedure, to be given by such holders where an action of partition has been brought by a remainderman. It further appeared that after the will of the testatrix had been probated, her son and his wife, her daughter and her husband voluntarily conveyed to the same trustees all the property in question upon the same trusts as were created, or were attempted to be created, by the will, and that this instrument of conveyance clearly created a valid express trust to hold the premises, receive the

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rents and profits and apply them to the use of the same beneficiaries during life.

Held, that as this trust, although voluntary, was still in existence and had never been revoked, it constituted an additional bar to a sale of the premises under section 1533 of the Code of Civil Procedure.

ACTION for partition.

Edmund Coffin, for plaintiffs.

Thomas D. Rambaut and Edward H. Wilson ,for defendants Joseph R. and Susan R. Peirson.

George C. Holt, for defendants Anthony Van Bergen and Joseph Walker, trustees, etc.

Payson Merrill, for defendant guardian *ad litem*, Susan Walker Peirson.

HISCOCK, J. This is an action of partition, the premises involved being situated in the city of New York. It was conceded upon the trial by the plaintiffs and is undisputed that an actual partition cannot be had of the premises, but that if any disposition is made it must be by a sale thereof. The plaintiffs claim to be vested as remaindermen with the title to a portion of the premises in question subject to certain life estates, that the persons holding such life estates; have so consented in writing to a sale of the premises in accordance with the provisions of section 1533 of the Code of Civil Procedure, and that the same may be had and decreed herein. Certain of the defendants, as the trustees and guardian *ad litem* above mentioned, have practically submitted their rights herein to the court. But other defendants, especially said Joseph R. Peirson and Susan R. Peirson, actively and affimatively oppose plaintiffs' claims, among other defenses urging that the premises in question are now in the possession of said trustees under a valid trust for certain lives, and that they cannot give any such consent as is required under the section of the Code just mentioned and that, therefore, there cannot be a sale of the premises decreed herein. These contentions lead to a consideration of certain facts appearing herein as follows:

Julia F. Peirson, the ancestor of the parties claiming an interest in the premises, died seized thereof July 3, 1886, leaving her surviving no husband, and but two children, Joseph R. Peirson and

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Julia Augusta Van Bergen, and also certain grandchildren, parties hereto, of whom the plaintiff is one, he being the son of Joseph R. Peirson. She also left a last will and testament dated December 1, 1882, which has been duly admitted to probate and which after making certain personal and small bequests provided as follows:

"And (subject to the payment of said legacies and annuities and of my just debts and my funeral and testamentary expenses), I give, devise and bequeath unto the said Anthony Van Bergen and Jacob Walker (defendants herein named as trustees in said will), and their heirs, executors and administrators, all my real and personal estate whatsoever and wheresoever *upon the trusts* following, as to one equal third share thereof upon trust for my said son Joseph R. Peirson for his life, with remainder for Susan, his wife, for her life, with remainder for their children or child living to attain the age of twenty-one years, and if more than one, equally, share and share alike as tenants in common. And in default of any such children or child then the said share so intended for the benefit of my said son Joseph Robert Peirson and his wife and their children or child shall be held by my said trustees for the benefit of my said daughter Julia Augusta Van Bergen and her husband or children or child as if the same were included in the share hereinafter provided for my said daughter and her husband and children or child. And as to one other equal one-third part or share of my residuary real and personal estate my trustees shall hold the same upon trust for my said daughter Julia Augusta Van Bergen for her life for her separate use, with remainder for her husband, the said Anthony Van Bergen, for his life, with remainder for their children or child living to attain the age of twenty-one years and if more than one, equally, share and share alike as tenants in common. And in default of any such children or child of my said daughter and her said husband then the said share so intended for the benefit of my said daughter and her said husband and their children or child shall be held by my said trustees for the benefit of my said son and his said wife and their children or child, as if the same were included in the share hereinbefore provided for my said son, his wife and children or child. And as to the remaining equal one-third part or share of my residuary real and personal estate my trustees shall hold the same upon trust for my said son-in-law Jacob Walker for his life with remainder," etc.

By a codicil the third trust in behalf of Jacob Walker was cut out, the share originally covered thereby going to the son and daughter

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above mentioned under and in accordance with the provisions covering the other two shares respectively.

The question raised by the defense of Joseph R. Peirson and his wife above referred to, is whether the language and provisions above quoted do create a valid trust at least during the life of Joseph R. Peirson and his wife and Augusta Van Bergen and her husband (for she was married), who, although dead, has left such husband surviving who is a party to this action. It is claimed by the plaintiffs that no such valid trust was or is created and that, therefore, the alleged trustees are not invested with any such title to the premises in question for the lives of said son and daughter and their respective wife and husband as stands in the way of this action or a sale of the premises.

The defendants Peirson, upon the other hand, insist that the provisions were sufficient to create a trust, valid and recognized by our statutes, in the trustees to hold the property in question, including the premises involved in this action, during the life at least of Joseph R. Peirson and his wife and Augusta Van Bergen and her husband, to collect and receive the rents thereof and pay them over to the beneficiaries in the shares designated.

Of course, if the provisions do create such a trust as is last suggested it is valid; and in accordance with the well-settled principles of trusts, the trustees could not give the consent which is necessary to the maintenance of this action or, except under certain circumstances, be parties to the sale of said premises. Baldwin v. Humphrey, 44 N. Y. 609; Harris v. Larkins, 22 Hun, 488; Losey v. Stanley, 147 N. Y. 560, 568.

I have reached the conclusion that the contention of the defendants Peirson is well founded, and that the provisions quoted do create a valid trust in the trustees named to hold the premises and collect and receive the rents and profits for the benefit of the beneficiaries. The language employed is of course inapt and incomplete and does not express this purpose fully and plainly. Carefully considering, however, all that is said, it seems to me that the intent to accomplish the purpose named can be seen and spelled out within the rules of construction applicable to such a case. The three trusts, as originally designed, are created in the single clause quoted. It was manifestly the intention to dispose of all of the three shares in the same manner upon similar limitations, and, therefore, the language used in reference to any one share may be considered in determining the purpose of the testatrix with reference to all of

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the shares. Following this course we find that the property was devised to the trustees named "upon trust" for the beneficiaries named; that it was "intended for the benefit" of them; that it was to be "held by said trustees for the benefit" of them; that the testatrix desired that said trustees "hold the same upon trust for my said daughter Julia Augusta Van Bergen for her life for her separate use;" that in default of any children "the said share so intended for the benefit of" said daughter was to "be held by * * * said trustees for the benefit of" the son of said testatrix and his wife.

These and other expressions seem to indicate pretty clearly as the intention of the entire provision that the property was devised to said trustees to possess and hold, and that, for the benefit of the respective beneficiaries. There is only one apparent way in which this trust and obligation could be discharged and that is by the trustees holding the property, managing it and collecting rents and profits for the benefit of the persons entitled thereto. This would be concededly an active and legal trust. The construction placed upon the language and the conclusion reached seem to be within the principles laid down in Mullins v. Mullins, 79 Hun, 421; Donovan v. Van De Mark, 78 N. Y. 244; Kiah v. Grenier, 56 id. 220; Stagg v. Beekman, 2 Edw. Ch. 89; Morse v. Morse, 85 N. Y. 53, 60; Vernon v. Vernon, 53 id. 350, 359.

If the foregoing conclusion is correct it is concededly a bar to this action and it is not necessary and perhaps not desirable that the court at this time should pass upon the validity or effect of the various limitations over after the death of the son and daughter and their respective wife and husband to the grandchildren. If questions arise in regard thereto hereafter they can be determined at the proper time.

Even if I am wrong with reference to the trusts attempted to be created by the will, it seems to me that there is another trust which vests the trustees with the possession of said premises for lives not yet determined and which, therefore, prevents a sale of the premises.

After the foregoing will had been probated and on or about July 9, 1889, Joseph R. Peirson and Susan R., his wife, Julia Augusta Van Bergen and Anthony, her husband, and Anthony Van Bergen and Jacob Walker as trustees (with another merely formal party) executed an instrument whereby, in substance, said Peirsons and Van Bergen conveyed to said trustees all of the property derived under the will in question and including the premises involved here upon the same trusts so far as said grantors were concerned, as were

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attempted at least to be created by the will in question. Said trustees were to hold said premises and collect the rents and profits and pay the same to said Peirsons and Van Bergens in the same manner indicated by said will. Augusta Van Bergen is dead, but the other three are still living, and as already stated plaintiff is the son of Joseph R. Peirson. So far as appears, nothing has ever been done to terminate or modify this trust. It is a valid one and the trustees hold the property for the purpose of carrying it out. It is true that under certain circumstances a voluntary trust of this character may be revoked. Whether it could be done in this case where there was a mutual trust conveyance and one of the parties executing it is dead is uncertain (Livingston v. New York Life Ins. & Trust Co., 36 N. Y. St. Repr. 566), but I expressly refrain from passing upon that question. It is sufficient to say that it is not presented here. The facts disclose a valid trust for lives still in existence, originally voluntary, it is true, but none the less binding upon the trustees and none the less effectively a bar to a sale such as it is conceded must be decreed in this case if any relief is granted.

It is urged by the plaintiffs and by some of the defendants that the court may permit the trustees to lease, mortgage or even sell the trust property held by them. This of course is so, but such permission is given only upon a proper case established. Such a sale is not within the lines of an ordinary partition action and there are no facts before the court upon which it could make a decree of sale upon that theory even if it were disposed to.

These conclusions lead to a judgment dismissing plaintiffs' complaint with costs to each set of defendants who have appeared by separate attorney.

Findings or decision and judgment in accordance herewith may be prepared by the counsel for the defendants Joseph R. and Susan R. Peirson and submitted to the other counsel for approval; failing to so approve they may submit to me proposed amendments.

Ordered accordingly.

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HARRIET E. MILNE, Plaintiff, *v.* THE NORTHWESTERN LIFE ASSURANCE CO., Defendant.

(Supreme Court, New York Special Term, May, 1898.)

Settlement of a disputed claim.

A settlement made with a life insurance company, by a beneficiary of a disputed claim under the advice of her attorney and not accompanied by any fraud or coercion upon the part of the company, will not be set aside; and the questions whether the action of the beneficiary in the premises was ill-advised, or whether the alleged sickness and bad habits of the insured, as claimed by the insurer, were not entirely as it asserted, cannot be permitted to affect the settlement.

ACTION to set aside as fraudulent a settlement made by a beneficiary of certain insurance issued by the defendant upon the life of her husband.

J. K. Hayward and Charles Donohue, for plaintiff.

David Murray and Clifford W. Hartridge, for defendant.

HISCOCK, J. This action is brought to set aside as fraudulent, a settlement made by the plaintiff as beneficiary of certain insurance issued by the defendant upon the life of her husband, Charles Milne, by which settlement she accepted the sum of $2,500 in full of insurance amounting to $10,000; also to recover against defendant the full amount of said insurance.

The following facts, amongst others, were established by the evidence:

Upon July 8, 1882, and April 24, 1888, the defendant (then transacting business as the Northwestern Masonic Aid Association), issued to Charles Milne four certificates whereby, in substance, under certain conditions, it promised to pay to his wife, the plaintiff, upon his death the aggregate sum of $10,000. Subsequently and on or about February 11, 1892, said association issued one certificate upon the life of and to said Milne for the sum of $10,000, and which said certificate it is claimed by defendant was in the place of and retired said four certificates above mentioned. On or about December 16, 1895, said Milne made an application to said association for reinstatement under said last-mentioned certificate for $10,000 upon the ground and theory that the same had lapsed, and which reinstate-

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ment was granted by said association and accepted by said Milne. In connection with and as part of said application for said reinstatement said Milne made certain agreements and warranties and amongst others as to his freedom from sickness and from the excessive use of intoxicating liquors.

Said Milne died September 26, 1897. The defendant entered upon certain investigations and acquired certain information and reports with reference to his physical condition for some time prior to his death and at and preceding the time of the aforesaid application for reinstatement. Shortly after his death defendant's agent sought and interviewed the plaintiff, claiming, in substance, that certain of the warranties and agreements made upon such application for reinstatement were false; that the insurance was, therefore, void and offering $2,500 in settlement of the claim, which was accepted and which it is now sought to set aside.

I will consider separately three propositions urged by plaintiff's counsel as reasons why this relief should be granted.

First: It is urged, as I understand it, that the four certificates of insurance originally issued to plaintiff's husband were not exchanged for and replaced by the last certificate for $10,000; that defendant had no right to make such a change; that said original policies are still in full force and effect and were not covered by the settlement made between plaintiff and defendant. The plaintiff in her complaint sets out said policies as the basis of the recovery now asked for.

If this theory were correct it is difficult to see what occasion there would be for this action. If the original certificates are still in force plaintiff's remedy would seem to be an action in the ordinary form upon them and there would be no occasion to attack the settlement of another policy which it is claimed was in nowise related to them. I do not, however, regard plaintiff's claim in this respect as well founded. It is beyond question upon the evidence that the certificate for $10,000 was issued in the place of and to retire said original certificates. The old certificates were delivered up to the company. The new certificate expresses upon its face that it was in place of them, and during all of the years succeeding its issue it was so treated by plaintiff's husband. In addition to that plaintiff, herself recognized it as the existing insurance by making and filing her proofs of loss against the defendant thereon.

Second: It is urged that there was in 1895 no valid lapse of the insurance issued by defendant and that, therefore, there was no occasion or consideration for the application made by plaintiff's

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husband for reinstatement and for the agreements and warranties therein which were subsequently made the basis of defendant's claim to nonliability and of the settlement now attacked.

I regard that question also as foreclosed against plaintiff. There was manifestly a claim that Dr. Milne's insurance was lapsed. This claim may have been well founded or as urged by plaintiff's counsel invalid and without foundation. It does not appear whether there was any contest between the insurer and the insured upon this question, but without any fraud or misrepresentations so far as appears the matter was adjusted by the insured making an application for reinstatement, and the insurer granting such application. This was an adjustment of the matter and of any controversies to which it may or might have given rise, and that adjustment having been recognized and acted upon by both of the parties thereto down to the time of the death of the insured, I do not believe that its legality can now be questioned, at least upon the evidence introduced in this case.

Third: I come now to that reason urged by plaintiff which as it seems to me is most entitled to consideration of all of those raised in her behalf, viz.: the alleged invalidity of the settlement. These facts which are substantially undisputed by plaintiff or her evidence led up to and attended the making of the settlement in question. One Bronk after the death of Dr. Milne made an investigation of his prior health as it was at the time of his application for reinstatement and he acquired certain information which was imparted in a letter sent to the defendant — Exhibit 11. Thereafter one Smith as the representative and adjuster of the defendant came on to New York and saw Bronk and also one Dr. Bleyer who was and is in nowise connected with the defendant, but who was acquainted with the Milnes. Through him an appointment was made between Smith and Mrs. Milne. Smith, Bronk and Dr. Bleyer called upon Mrs. Milne. The letter, Exhibit 11, was read to her and the claim made by Smith in behalf of the defendant, in substance, that the policy had lapsed in 1895; that her husband was reinstated upon certain agreements as to his health; that those agreements were untrue, etc.; that, therefore, the company was not bound upon the policy, but would pay $2,500 to settle the claim. Mrs. Milne at first agreed to make such settlement, but then concluded that she wanted to talk with a friend. She went accompanied by the other persons named and talked with this friend who in turn advised her to consult with a lawyer. She then consulted such attorney. The representative of the insurance company went with her and stated

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more or less fully its claims. Finally the attorney advised her to make the settlement which was done. In addition to this, there is evidence in behalf of the defendant, some of it more or less disputed, that Dr. Milne had been sick as reported to it, and that the plaintiff made certain admissions in regard to this sickness and in regard to his habits in the use of intoxicants. There is no sufficient evidence that defendant's agents intentionally or wrongfully misrepresented the facts about the sickness of the insured.

After considering the foregoing and all of the other facts in the case, I am unable to agree with plaintiff's contention that defendant had been guilty of such fraud and misrepresentation as entitled her to have her settlement with it set aside. It is not, of course, a sufficient basis for such relief, even if it be assumed that her settlement has been ill-advised or injudicious or that she could probably recover more money in a lawsuit, or that defendant's claim of a defense to the policy was not well founded or that the alleged sickness and habits of the insured were not entirely as claimed by it. The question is whether the defendant by active, intentional, fraudulent misrepresentations or suppression of facts contrary to its obligation to plaintiff induced her to make the settlement. Upon this subject there is nothing to indicate that defendant did not act in good faith or that it misled plaintiff in regard to her husband's condition. His condition of health at the time in question and upon which defendant made its claim of nonliability was not a fact peculiarly within the knowledge of the defendant. But, upon the other hand, it was a fact about which the plaintiff must have known much more than did the defendant. It is difficult to see how the defendant could very well mislead or deceive the plaintiff upon the subject of her husband's sickness or freedom therefrom. Neither does it appear that plaintiff through the persuasion or coercion of defendant entered into the settlement precipitately. She advised with those whom she thought capable of giving advice, including an attorney, and after availing herself of such advice and safeguards she made the settlement in question. I am unable to see how the court upon the evidence produced can relieve her from this act in this action.

In accordance with these conclusions, findings or decision and judgment may be prepared by defendant's attorneys, with costs, and submitted to plaintiff's attorneys, who may if dissatisfied with the same submit proposed amendments.

Ordered accordingly.

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ALEXANDER KOPPEL, Plaintiff, *v.* HILDA ANNE MARIE HOLM et al., Defendants.

(Supreme Court, New York Special Term, May, 1898.)

Partition — Insufficient proof of the will of the deceased owner, drawn in a foreign country.

A stipulation showing that the person, a citizen of the state of New York, through whom all the parties to an action of partition claimed, died in a foreign country and left a writing, there made, which was duly deposited in a court of the foreign country where administration was had and that this paper, never proved or established as a will in the state of New York, had upon its face certain acknowledgments and witnesses, when not accompanied by any proof that the paper was executed and acknowledged according to the requirements of our Statute of Wills, affords no basis for a defense, interposed in the action, that this paper, a copy of which was annexed to the answer, governed, as a will, the disposition of the premises.

ACTION for partition.

Smith, Griffin & Buxton, for plaintiff.

Frederick Cobb, for defendants.

HISCOCK, J. This action is brought for the partition of certain premises consisting of a house and city lot in the city of New York. The only defense urged is that one Sander B. Koppel, who owned the premises and through whom the various parties claim as widow and heirs-at-law respectively, died, leaving a last will and testament which governs the disposition of the premises in question. No evidence was given upon the trial, but certain facts were stipulated. It was agreed, amongst other things, that said Koppel, being a citizen of the United States died in the city of Copenhagen, Kingdom of Denmark, leaving a certain paper or writing purporting to be his last will and testament, which was drawn and executed in said city of Copenhagen, dated April 12, 1876, and a copy of which is annexed to the answer of the defendants, and that a copy of said paper writing was duly deposited in the Dealing Court of the southern district of the Bailiwick of Copenhagen, and the estate of said Koppel situate in the said Kingdom of Denmark thereafter admin-

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istered pursuant to the laws of said kingdom and the terms of said will; that said paper writing has never been filed for probate or admitted to probate as a will or otherwise in the state of New York, nor has the same been established in the state of New York as a will of real and personal property and no letters of administration have ever been issued upon the estate of said Koppel.

There is nothing in said stipulation showing how or with what forms said paper was executed by said Koppel except as certain inferences (not necessarily legal) may be drawn as to certain things from the form of the paper itself.

Various reasons are urged by the plaintiff why defendants should not be allowed to avail themselves of the purported last will and testament as a defense to this action, and some of these reasons present questions worthy of consideration. Outside of those urged, however, there is one ground which in my opinion presents a conclusive answer and objection to defendants' attempt to set up said instrument. There is, as I have stated, no evidence whatever to show the manner or method of execution by the testator of the instrument. This does not even appear from the face of the copy of the paper, if that were competent and sufficient evidence, which it is not. For while it would appear from the face of the paper that there were certain acknowledgments and witnesses, it does not appear that they were made or acted in the manner prescribed by our statute relating to the execution and especially the witnessing of wills. It is well settled that in order that a paper may be proved or have effect as a last will and testament governing the disposition of real property it must appear that the same was executed in accordance with the provisions of our statutes upon that subject, and this not so appearing in connection with this paper it is not valid for the purposes urged by defendants. Code, § 2611; Vogel v. Lehritter, 64 Hun, 308; Matter of Klett's Will, 3 Misc. Rep. 385.

It appearing that the premises are so circumstanced that they cannot be actually partitioned, findings or decision and the ordinary interlocutory judgment may be prepared directing a sale of the premises under the direction of George C. Austin, Esq., as referee, when the court has been furnished with a search as provided by Code, § 1561.

Ordered accordingly.

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WALTER BROWN, Plaintiff, *v.* JAMES SEARS et al., Defendants.

WALTER BROWN, Plaintiff, *v.* ALBERT GURNEE et al., Defendants.

WALTER BROWN, Plaintiff, *v.* BYRON M. BRITTON et al., Defendants.

(Supreme Court, Onondaga Special Term, May, 1898.)

Referee's fees — Several similar cases tried together — "Expenses" of the referee — Stipulation that he might "fix his own fees" — Apportionment of witnesses' fees — Copies of stenographer's minutes.

The parties to three actions of a similar nature, brought by the same plaintiff and tried together before the same referee, stipulated that the referee might "fix his own fees," that the stenographer's fees should be paid one-half by the plaintiff and one-half by the defendants, that the successful parties might tax the portion of these fees paid by them as a disbursement and further "that the evidence is to be taken as in one case and to be deemed to be taken in all of the cases so far as applicable." The referee found for the defendants in all the cases and they were represented by different attorneys.

Held, that the defendants were not entitled to tax full referee's fees in each case, that the fees paid should be apportioned ratably among all the cases; but that, additionally, the referee would be entitled to fees for any labor, bestowed upon a particular case, which labor was not common to all the cases.

That the referee was not entitled, in addition to his fees, to "expenses," these consisting of car fare, hotel bills, etc.

That a stipulation that the referee might "fix his own fees" was not a sufficient compliance with section 3296 of the Code of Civil Procedure limiting a referee to $10 per day unless "a different rate of compensation is fixed" and that consequently he was entitled to only $10 a day.

That but one set of witnesses' fees were taxable in all the cases, where witnesses were called but once and had then testified for the benefit of all the cases.

That as the stipulation did not state how many copies of the stenographer's minutes should be made, and as the plaintiff's attorney had apparently acquiesced in the making of a third copy, it was taxable.

MOTION to correct a taxation of costs in each of the above-entitled actions by the county clerk of Onondaga county, in favor of the

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defendants in each of said actions by striking out certain items for referee's fees, witnesses' fees and stenographer's fees allowed therein.

Edwin Nottingham, for motion.

L. L. Waters, opposed.

HISCOCK, J. The above-entitled actions were referred to and tried before the same referee. At the commencement of the trial the following stipulations were made by the attorneys for the various parties and entered upon the record, viz.:

"Stipulated that the referee may fix his own fees.

"Stipulated that the stenographer's fees shall be paid one-half by the plaintiff and one-half by the defendants in the above cases, and that the successful parties may tax the portion paid by them as a disbursement.

"Stipulated that the evidence is to be taken as in one case and to be deemed to be taken in all of the cases so far as applicable."

Nothing further than the above stipulation was ever done to fix the rate of compensation of the referee. The cases were tried as one, the same attorneys or counsel taking part in and conducting the trial in behalf of all the defendants in the different actions, although there were different attorneys of record.

The referee found in behalf of the defendants in each case and judgment was in accordance with such referee's decision entered in their favor. The referee's certificate was to the effect that he was occupied twenty-five days in all of the cases together, and that he incurred about $150 expenses in the way of car fare, hotel expenses, etc.

The defendants were by the clerk allowed to and did tax, the statutory allowance of $10 per day for the entire number of days occupied by the referee in all of the cases, in every one of them; and also one-third of the above expenses, to-wit: $50 in every one of the cases. In addition, the fees of all of the witnesses called by the defendants were taxed in every one of the cases, amounting to $45.08 in every case, although the witnesses under the arrangement above indicated were not called and sworn separately therein.

The fees of the stenographer who took the minutes upon the trial were taxed at an aggregate of $650, divided equally between the three cases.

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Plaintiff claims that it was error to tax the referee's fees for the entire time consumed in all of the cases, separately in every one of them; also to tax the expenses above incurred; also to tax the entire fees of all of the witnesses separately in every case; also that the stenographer's fees were taxed erroneously in that allowance was made for a third copy of the minutes, which was not authorized.

I think it was error to tax the fees of the referee for the entire time occupied in the three cases separately, in every one of them, which is in effect, as claimed by the plaintiff, allowing the referee three days' fees for each day occupied. It doubtless might happen that a referee in many different cases might technically hold a session in all of them on the same day and, therefore, be entitled to several days' compensation for one days' work, but this would be where there was no relation between the cases. That is not the case here. The same person was plaintiff in all of these cases. The subject-matter of all of them was more or less related and the defendants had a common interest, although technically, perhaps, separate rights. The same attorneys appeared and acted together for all of the defendants. Under these circumstances they were referred to the same referee under a stipulation practically that there should be one trial in all of the cases at once, and this was as a matter of fact what happened. Under such circumstances, I think it very clear that the reasonable construction is that the trial was a common one for the benefit of all three cases and that the expenses in the way of referee's fees should be divided equally between such cases, rather than that such trial should be treated as a separate and distinct one for every one of the cases and the fees of the referee for time spent therein be taxed three times. Upon the completion of the trial the referee would be entitled to spend such time in every case in carrying out and applying the labors of the trial to that particular case in the way of findings, decree, etc., as might be necessary, and fees for this time added to one-third of the fees for the labor, common to all of the cases, would be the proper charge in that particular case. It was assumed, however, that if the defendants were not entitled to tax full fees in every case as they had done, a division accurate enough would be arrived at by apportioning the entire fees equally between the three cases, which may be done.

I do not know and there has not been cited to me any law which entitles parties to tax the expenses of a referee such as those above mentioned. The provisions of section 3296, Code, covering this subject when it provides that a referee "is entitled to ten dollars for

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each day spent in the business of the reference" seems to exclude the idea of a further allowance for such expenses in the absence of special provision therefor.

The stipulation made by the parties and above referred to, that the referee might fix his own fees, was not a sufficient compliance with the provisions of the same section of the Code, limiting a referee's fees to $10 per day "unless at or before the commencement of the trial or hearing, a different rate of compensation is fixed * * * manifested by an entry in the minutes of the referee or otherwise in writing." The amount taxed for referee's fees and expenses, therefore, must be reduced in each case to one-third of a per diem of $10 for twenty-five days, certified by the referee unless the defendants elect to accept the stipulation of the plaintiff, that referee's fees may be allowed and taxed at $25 per day for twenty-five days, and the sum of $100 allowed and taxed for expenses.

I do not think that the defendants were entitled to tax witnesses' fees for every witness in every one of the cases or three times altogether.

What has been said in connection with referee's fees with reference to the cases being tried as one case applies also, of course, to the witnesses' fees. The witnesses, as I understand it, were called once and sworn for the benefit of all three cases. If it had been necessary for the defendants to compel the attendance of a witness in all three of these cases it would have been proper to pay and tax fees three times, and if the cases had been tried as separate cases it would undoubtedly have been proper for the defendants to so subpoena their witnesses in every case and pay fees therefor. But I do not think that this was the contemplation of the parties, or that the defendants, as a matter of precaution and safety even, were so required to do with their witnesses. It was expressly stipulated that "the evidence is to be taken *as in one case* and to be deemed to be taken in all of the cases so far as applicable." The plain meaning of this, it seems to me, was that the witnesses should be subpoenaed and sworn in one case and then that their evidence should be applied to and used in the other cases, and that it was not necessary for the defendants, in order to get the evidence of a witness, to subpoena him in three cases. So far as appears, the evidence of all of the different witnesses was applicable to all of the cases, and when one of them had been subpoenaed and sworn in one case, defendants, under the stipulation in question, had the benefit thereof in the other cases and there was no necessity for subpoenaing him therein.

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This conclusion leads to correcting the taxation of the witnesses' fees by apportioning one set of fees to the three cases.

The only complaint urged against the stenographer's fees is that defendants have paid for and are seeking to tax the expense of a third copy of the stenographer's minutes at the sum of $170. The stipulation covering this subject and above quoted did not provide how many copies should be written out, and there is not very clear evidence upon that subject. There seems to have been a misunderstanding between the attorneys about how many copies there should be, but upon all of the facts I am disposed to think that there was enough of an acquiescence of the plaintiff's attorney in the printing of the third copy so that the defendants' attorneys, having paid therefor in good faith, should be allowed to tax the same.

The defendants' attorneys make a cross motion for the allowance of motion costs upon the dissolution of injunction orders which were originally granted in these cases, and think they should be allowed $10 for the motion which they made to dissolve the same. If plaintiff's attorney consents thereto, they may be allowed $10 costs for such motion and he may be allowed $10 costs of this motion. Otherwise no costs are allowed for either motion.

Ordered accordingly.

THE MUTUAL LIFE INSURANCE CO. OF NEW YORK, Plaintiff, *v.* DAVID C. ROBINSON et al., Impleaded, Etc., Defendants.

(Supreme Court, Tioga Chambers, May, 1898.)

Foreclosure — Stay to subsequent purchasers, appellants in the Court of Appeals, not liable for a deficiency and who have surrendered possession to the mortgagee — Terms, when the stay may benefit a party liable for a deficiency — Power of a judge out of court.

Purchasers, subsequent to a mortgage and not liable for a deficiency, who have prior to a judgment of foreclosure surrendered possession of the premises to the mortgagee, are entitled to a stay, pending their appeal in good faith to the Court of Appeals from an affirmance of the judgment by the Appellate Division, upon the same terms as a party in possession who appeals; and as they have, by their surrender to the mortgagee of possession, in effect, given the mortgagee all the security which can be demanded of them under section 1331 of the Code of Civil Procedure as amended in 1897, this con-

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sisting in securing the mortgagee against waste and for the benefit of the use of the premises, they need give no further security as a condition of the stay.

As a stay must, however, inure to the benefit of all parties and as a defendant liable for a deficiency might, by collusion with a defendant not so liable and who had appealed first, secure the benefit of the stay without giving the statutory security, the court directed that, in case a defendant, against whom a judgment for a deficiency had been rendered in the action, should subsequently appeal, the stay granted to the subsequent purchasers should be vacated, to the end that an order for a stay might be made which would be just to all parties under the circumstances. A judge out of court may grant such a stay under the provisions of section 775 of the Code of Civil Procedure.

MOTIONS in five cases to stay sales of property under judgments of foreclosure and sale pending appeals to the Court of Appeals.

The facts are sufficiently stated in the opinion.

A. C. & J. P. Eustace, for motion.

Edward Lyman Short and John B. Stanchfield, opposed.

PARKER, J. Judgment was rendered in this action against the defendants for a foreclosure of the mortgage and for a sale of the real estate therein described. Such judgment was affirmed upon appeal to the Appellate Division of the Supreme Court, and from that judgment two of the defendants, David C. Robinson and Emma, his wife, have appealed to the Court of Appeals. Neither of such appellants is liable for any deficiency arising upon the sale, and neither of them is in possession of any of the mortgaged premises. They stand in the position of purchasers subsequent to the mortgage, and they had, prior to the judgment herein, surrendered to the plaintiff as mortgagee the entire possession of such premises, and it now holds and controls the same.

This application is made by such appellants for a stay of proceedings upon the judgment so appealed from, until the final decision of the Court of Appeals.

The Code of Civil Procedure makes no provisions for staying execution upon a judgment for the foreclosure and sale of mortgaged

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premises save those contained in section 1331. By that section, as amended in 1897, a party in possession who appeals may stay execution by giving an undertaking to the effect that he will not commit any waste while he remains in possession, and that he will, in case there is a deficiency upon the sale, pay the value of the use and occupation of the premises in the event that the judgment is affirmed or the appeal dismissed, not exceeding a sum fixed by a judge of the court below. If an appeal is taken by a party against whom a judgment for deficiency is awarded, the undertaking must provide that if the judgment is affirmed or the appeal dismissed the appellant will pay any deficiency which may occur upon the sale, with interest, costs, etc., not exceeding a sum fixed by a judge of the court below.

The appellants, being neither in possession nor adjudged to pay any deficiency, are not within the category of those who may stay execution by the giving of an undertaking, and they are, therefore, forced to make this application.

That a judge out of court has power to stay proceedings upon a judgment so appealed from is I think fairly inferable from the provisions of section 775 of the Code. Laney v. Rochester Ry. Co., 81 Hun, 346, 348. And, therefore, the only question presented to me is as to the propriety of any stay being granted to these appellants, and as to the terms upon which it should be allowed, if allowed at all.

As to the propriety of a stay, there is no reason apparent why one should be allowed to a mortgagor who is liable for the deficiency and not to a subsequent purchaser who has surrendered possession of the premises to the mortgagee.

Although the statute has secured to the former the right to such a stay, upon giving an undertaking, and has omitted to secure a similar right to the latter, it is not to be presumed that it intended to utterly exclude the latter from the benefits of such a stay. A sale prior to final decision upon the appeal would be as disastrous to him who is the owner of the fee as to him who is liable for a deficiency only, and it is as just to stay the sale in the interest of the one as the other. The appellants in this action have a clear right to appeal, and a plain interest to stay the sale in order that their title and interests in the premises may be the more surely preserved, in the event that the judgment against them is reversed. Whether there is any merit in the defense which they have interposed, and whether they are likely or not to succeed upon their appeal, are not questions which I can consider on this application; and I can see,

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therefore, no reason why a stay should not be granted to them, inasmuch as it is secured by the statute to other defendants to whom it is no more of a necessity.

The next consideration is as to the terms upon which it should be granted.

It will be noticed that the statute provides that a party in possession, who appeals, may stay a sale by securing to the respondent protection against a waste of the premises, and the benefits of their use. Thus, if these appellants had retained their possession of the premises, they could have, under section 1331, secured the stay which they desire by giving an undertaking to that effect. Is there any reason why the court should require from them any further security? I think not. The security which the statute considers sufficient should be deemed equally so by the court when it is called upon to grant a similar privilege under precisely similar circumstances.

The theory of the statute evidently is, that when the appellant who seeks to stay the sale is the one who is adjudged to pay the deficiency, he may not have that stay unless he gives an undertaking to secure such deficiency. But, as against any other interested party who appeals, an undertaking that will secure to the respondent the value of the use of the premises and immunity from waste thereon, is all that he can justly ask. It may be, as is urged by the respondent's attorney, that it does not secure the respondent against a deficiency arising from an accumulation of interest, depreciation in the market value of the premises, and loss that may occur from destruction by fire or other means — but, as is said in Grow v. Garlock, 29 Hun, 600, approved in 119 N. Y. 632, this is an omission that can be remedied only by the legislature. Moreover, it can hardly be considered a just, or a proper exercise of equitable considerations, to require from an appellant against whom no judgment for a deficiency has been or ever can be obtained, an obligation to pay that deficiency as a condition for staying the sale. The immediate execution of the judgment gives to the respondent, as against such an appellant, the immediate possession of the land only. As to him, the proceeding is against the land *merely*, and, if such proceedings are stayed, the most that he should be called upon to secure is satisfaction for the loss of the use and occupation thereof and security against waste. At least such is the evident theory upon which the statute is framed, and which in my judgment must be followed on this application.

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I conclude, therefore, that these appellants should be allowed to stay this sale, when they have furnished to the respondent the same security which the statute would have required from them had they retained the possession of the property. To require more would be an unreasonable and invidious distinction. To compel them to give security for the payment of the deficiency would be imposing upon them a greater burden than is imposed by the judgment from which they have appealed.

It is conceded that these appellants have already given to the respondent the full possession of the mortgaged property. The respondent is secured against waste, because it alone possesses and controls the property. For the same reason, it is secured the full value of its use and occupation. Hence, the appellants have already given the full measure of the security that should be required from them and an undertaking is unnecessary. Under the circumstances of the case, they are not only fairly entitled to a stay, but they should have it without giving any other security than they have already given.

It is urged with much force, that, under this rule, the defendant who is liable for a deficiency may, by connivance with a codefendant who is not, secure a stay without giving the security which section 1331 now requires from him. And it is apparent that such a result can easily be obtained if the one liable for the deficiency delays his appeal until after his codefendant has appealed and obtained the stay. An order staying the sale of the real estate cannot be operative as to one without operating as to all. Nevertheless, upon an application like this, it cannot be assumed that the appellants have appealed and obtained the stay only for the benefit of the one against whom judgment for deficiency has run. I cannot deprive them of a right apparently claimed in good faith, or impose upon them terms apparently unjust, because the proceeding furnishes a means for their codefendants evading a plain requirement of the statute. The defect is in the statute. Yet the situation is not an easy one in which to do thorough justice to all parties, and I conclude to insert in the order herein a provision that, in case an appeal is subsequently taken by the party against whom judgment for deficiency has been rendered, the respondent shall be at liberty to apply to the court at Special Term for an order vacating this stay, to the end that an order may be then made concerning a stay as shall be just under the circumstances. In the limited time

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I have had to examine these cases, I hesitate to make an order that after all may be used simply as a means to evade the statute.

In connection with this application a similar one has been made in three other actions in which the conditions are substantially the same. In each the appellants are not liable for any deficiency, and in each the respondent is in the full possession of the mortgaged property, except in the case numbered two. In that case, the principal part of the mortgaged premises is not in the possession of the respondent, but is in the possession of the mortgagor, David C. Robinson, against whom a judgment for deficiency has been rendered. In that case, it appears from an affidavit used on the part of the respondent, that the annual rental value of such portion of the property is $1,000. It also appears that the delay in sale likely to occur by reason of this appeal will be some three years, more or less.

Under such circumstances, I deem it just to require from the appellants, in that case, an undertaking against the commission of any waste on such premises, and also to the effect that in case the judgment is affirmed or appeal is dismissed and there is a deficiency upon the sale, they will pay the respondent the value of the use and occupation of such portion of the mortgaged property, from the time of taking such appeal until the delivery of possession thereof, pursuant to said judgment, not exceeding the sum of $4,000.

An order may be entered in each of said actions in conformity with the views above expressed.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK *v.* THEODORE B. WILLIS, et al., Defendants.

THE PEOPLE OF THE STATE OF NEW YORK, *v.* THEODORE B. WILLIS, Defendant.

(Supreme Court, Kings Trial Term, May, 1898.)

1. Crimes — Motion to set aside an indictment — Code of Criminal Procedure, § 671.

In the absence of the invasion of some constitutional right of the accused, a motion to set aside an indictment cannot be based on any grounds other than those stated in section 313 of the Code of Criminal Procedure, as amended by chapter 427 of the Laws of 1897. Section 671 of said Code is merely a substitute for a *nolle prosequi* under the old practice.

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2. Same — Grand jury — Evidence.

The grand jury is not to be held to the same strictness, in regard to evidence, as would prevail upon a trial and ought to find an indictment, where, in their judgment, the legal evidence, if unexplained and uncontradicted, would warrant a conviction by a trial jury.

3. Same — Conspiracy — Voluntary testimony.

Where a person charged with conspiracy is called before the grand jury at his own request and earnest solicitation, he cannot subsequently insist that his constitutional rights have been invaded by his having been compelled to testify against himself.

4. Same — Time — Statute of Limitations.

The Statute of Limitations cannot avail the defendants, upon a motion to set aside an indictment for conspiracy, even if the concoction of the corrupt agreement is alleged to have taken place at a date not within two years; and such a motion certainly cannot prevail where it appears that the conspiracy was not an instantaneous crime, finished and completed at the alleged date of its concoction, but was a continuous one, existing within the two years, and in active operation as to overt acts.

MOTIONS to set aside indictments, in two separate indictments, one for conspiracy and the other for bribery.

Benjamin F. Tracy, for motion.

Josiah T. Marean, district attorney, opposed.

VAN WYCK, J. The accused move to set aside the indictments in both cases on the grounds (1) that the grand jury received and acted upon illegal evidence in finding same; (2) that there was not sufficient evidence to warrant the finding of the same, and, in the conspiracy case, on the further grounds (3) that the action is barred by the statute of limitations, and (4) that Willis was compelled to testify against himself.

The correct solution of these questions requires the consideration thereof to be in the full light of the humane spirit and jealous care of our law for the accused. The decision of these motions can neither acquit or convict the defendants of the charges. This is simply a challenge, on their part, of the right of the State to even institute a criminal action against them under the circumstances.

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Counsel for both parties have directed my attention to the following section of the Code of Criminal Procedure: (1) "Motion to set aside indictments," section 313; (2) "Dismissal of criminal actions," section 671; (3) "Evidence before grand jury," section 256; (4) "Corroboration of accomplice," section 399, and (5) "Finding an indictment," section 258.

About the meaning of these sections and their application to these indictments counsel differ, which devolves upon the court the task of construing the same. As thorough an examination as time and other official duties would permit has been made of the history of all proceedings having for their object the trial of the conduct of the grand jury rather than that of the accused, which has been both interesting and instructive, disclosing the usual conflicts along the line of development of what appears to be a well-defined system. The Code of Criminal Procedure of 1881 seems to have been but the enactment, with some few modifications, of that reported with explanatory notes to the legislature in 1850 by a commission composed of David Graham and others, the preparation of which I have always understood was largely the work of Graham. This Graham Code would seem to be an important factor in reaching a proper or correct construction of that of 1881, though counsel have not referred to it in any way. The Code of 1881, section 313, says: "Indictment, when set aside on motion * * * in either of the following cases," viz.: Where not found by twelve jurors, or not indorsed a true bill and signed by foreman, or where not presented in court in presence of the jurors and filed by the clerk, or where a stranger has been present during the consideration thereof. This is a copy of section 332 of Graham's Code, the note to which declares it to be a substitute for the motion to quash under the old practice, "and comprises, as the grounds for the motion, such matters as affect the substantial rights of the defendant." Judge Andrews (People v. Petrea, 92 N. Y. 128) says, at page 144, if the defect is constitutional the court would without doubt be "bound to take notice of it, although no statute authorized it, or even if the statute assumed to preclude the raising of the objection. But if the defendant may be held to answer the indictment without invading any constitutional right, then the question is one of procedure merely, and the right of the defendant to avail himself of the objection is subject to the regulation and control of the legislature," and at page 145, he says: "The Code (§ 313), by defining the causes for which the indictment may be set aside, must,

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by the general rule of construction, be held to exclude the entertaining of the motion for other causes than those specified." The intention of the Code was to discourage technical defenses to an indictment, which do not affect the merits. Since this decision the other courts have manifested a disposition to differ from the views thereof, sometimes expressing a difference where in reality there was none, for the defect under consideration involved the invasion of some constitutional right, such as compelling one to testify against himself or depriving him of his liberty without due process of law, there being no evidence, or insufficient evidence in the sense that if, including all natural inferences therefrom, it is fully credited, it fails to sustain the indictment. People v. Singer, 5 N. Y. Crim. Rep. 1; People v. Haines, 6 id. 100; People v. Clark, 8 id. 174; People v. Brickner, 8 id. 217.

It appears that the tendency to disregard the limitations placed upon the motion to set aside or quash an indictment, under section 313, attracted the attention of the law-making power to the subject again, and the section was amended (Laws of 1897, chap. 427), by adding to the phrase, "in either of the following cases," the words, "but in no other." This would seem to establish the restriction of this motion to set aside or quash to the grounds specified, excepting constitutional defects, in accordance with the views expressed by Judge Andrews. No case holding otherwise, and decided since this amendment, has been cited. In some of the cases cited the power to set aside an indictment is rested upon the Code of Criminal Procedure, § 671, which provides that the court can, upon its own motion or that of the district attorney, in the furtherance of justice, dismiss a criminal action. People v. Brickner, 8 N. Y. Crim. Rep. 221; People v. Vaughan, 19 Misc. Rep. 298; 76 N. Y. St. Repr. 959. This section and the one following show on the face thereof that the former is merely a substitute for a *nolle prosequi* under the old practice, but if there should be any doubt of it, the note to Graham's Code (§§ 739 and 740) will set it at rest. It is there declared to be such substitute and a correction of some defects under the old practice, by giving the power to enter a *nolle prosequi* to the court on its motion, and by depriving the attorney-general of his then power to do so in all cases. The dismissal or *nol. pros.* of the action in pursuance thereof would, under section 673, work a bar to any further prosecution of the same misdemeanor. That these actions are not the proper ones for the use of the *nolle prosequi* can readily be seen

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by reference to Wharton's Criminal Practice & Pleading (9th ed., § 384), and the scope of the motion to set aside indictments under section 313 as it now stands, cannot help the defendants herein, unless some constitutional right has been invaded, for the grounds presented to me are not any of those specified in that section. This substitute (§ 313) for the motion to quash, and that (§ 671) for the *nolle prosequi* under the old practice, the power under the former having been decreased and that under the latter having been enlarged, furnish sure protection to defendants in all of their substantial rights, and, in fact, of all rights which it is at all necessary should be passed upon before the trial shall be reached, and this, too, is accomplished without the exercise of any legislative functions which, according to some of the decisions, is indulged in at times in response to some justice — exacting motive on the part of the courts. At the trial, the case is always submitted to the jury with that intendment of the law which is most favorable to the accused, or the court by way of command can advise an acquittal. The grand jury could not be expected to administer its functions with the same strictness and exactness as would prevail at a closely contested trial, where usually the points are sharply presented to the court by frequent objections, followed by exceptions to unfavorable rulings. Such a demand upon the grand jury, without the advantage of objection or the warning of exception, would be fatal in the end, to the present system of commencing criminal actions by indictment. The rule is much broader. "To confine the grand jury to the technical rules of evidence may be intolerable." Underhill on Criminal Evidence, § 26. The law-making power discloses a like disapproval of such stringent requirements as might be incapable of practical enforcement in the grand jury room. Graham's Code, § 260, reads: "The grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay and secondary evidence," but the Legislature (Criminal Code, 1881, § 256), significantly omits this sentence expressly excluding hearsay and secondary evidence. Hope v. People, 83 N. Y. 418-423. Graham's Code, § 454, and the Criminal Code, § 399, relating to the corroboration of an accomplice, both contain the sentence, "and the corroboration is not sufficient if it merely show the commission of the crime or the circumstances thereof," which was, for the accomplishment of some purpose, stricken out by the Laws of 1882, chapter 360. People v. Everhardt, 104 N. Y. 594. The mandate of the law (Code, § 258)

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declares that the grand jury ought to find an indictment when the evidence, in their judgment, if unexplained and uncontradicted, warrants a conviction by a trial jury. The inference to be fairly drawn from the foregoing provisions suggests a construction thereof which would strengthen rather than strangle the functions of the grand jury.

After carefully weighing and considering all the testimony in both cases, I am satisfied that the legal evidence with the required corroboration, uninfluenced by any illegal evidence, fully sustains these indictments and justified the grand jury in reaching the conclusion that the legal evidence, if unexplained and uncontradicted, would warrant a conviction by a trial jury. Hope v. People, 83 N. Y. 423; People v. Edwards, 25 N. Y. Supp. 480.

The defendant, Willis, was not compelled, in my opinion, to testify against himself in the conspiracy case, for the affidavit of District Attorney Marean makes it manifest that he was called before the jury at his own request and earnest solicitation. New York Const., art. 1, § 6; Code of Criminal Procedure, § 10; Underhill on Evidence, § 27. This being so, it becomes unnecessary to consider the effect of the inquiry being in a general investigation § 260, subd. 3, Code Criminal Procedure, or whether he really incriminated himself or not in the testimony he gave. People v. Aldermen, and People v. Supervisors, before Judge Moore in this county, are unreported.

In the conspiracy action, the Statute of Limitations can hardly avail the defendants on this motion, for, even if the concoction of the corrupt agreement is alleged to have taken place at a date not within two years, this is not conclusive upon the People. Code Criminal Procedure, §§ 339, 280, 293; People v. Van Santvoord, 9 Cow. 660; Underhill on Criminal Evidence, § 27. Beside, it appears that this conspiracy is not an instantaneous crime, finished and completed at the alleged date of the concoction, but a continuous one, existing within the two years, in active operation, as to overt acts. Wharton's Criminal Practice & Pleading (9th ed.), § 231.

These charges cannot be disposed of on these motions, but will have to be met at the trial of the actions, where the innocence of the defendants will be assumed, unless their guilt shall be proved beyond a reasonable doubt.

The motions must be denied.

Motions denied.

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THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* EDWARD V. LOEW et al., Defendants.

(Supreme Court, New York Special Term, May, 1898.)

Lloyds insurance — When such an association was not lawfully engaged in business on October 1, 1892, so as to be protected by Laws of 1894, chap. 684 — Associations incorporated merely for the purposes of sale.

On April 11, 1892, three persons prepared the papers for the organization of thirty different Lloyds insurance associations, identical in form except as their names differed, with one attorney and manager for the whole, their purpose being, not to conduct the business of insurance through the thirty different organizations, but to sell these organizations to subsequent purchasers. One of these organizations, known as the People's Fire Lloyds, issued four similar policies to persons within the circle of the associates and their business friends, not, however, in order to start and continue a general insurance business but merely to effect a nominal use of the apparent purpose of the organization. No more business was done and on March 14, 1894, the three associates elected a number of other persons as associate members and then themselves resigned pursuant to the terms of a transfer of the rights of the three original associates. In an action brought to have it declared that the defendants, their assignees, were unlawfully transacting the business of insurance by the name of the People's Fire Lloyds, Held, that the association was not protected by chapter 684 of the Laws of 1894 (amending section 57 of chapter 690 of the Laws of 1892, an act declaring that no association should engage as a principal in the business of insurance in this state unless possessed of the capital required of insurance corporations and unless it had made a certain deposit of securities with the state superintendent of insurance), providing that these requirements of chapter 690 of the Laws of 1892 should not apply to Lloyds associations which, on the 1st day of October, 1892, were lawfully engaged in the business of insurance within this state and which were not required to report to the state superintendent of insurance, as it was evident that insurance was only to be carried on as an actuality from the time when the original associators should separate themselves from the enterprise, and when the real insurers should take charge of the affairs of the association.

ACTION against "People's Fire Lloyds" for a judgment declaring the defendants to be unlawfully transacting the business of insur-

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ance and for an injunction restraining the issuance of policies of insurance.

Theodore E. Hancock, attorney-general, and Eugene L. Richards, Jr., for plaintiff.

Jacob A. Cantor, for defendants.

RUSSELL, J. The relief sought is a judgment declaring the defendants to be unlawfully transacting the business of insurance in this state by the name of the "People's Fire Lloyds," and, so, unlawfully claiming to exercise a privilege or franchise not granted by the laws of the state; and for an injunction restraining the issuance of policies of insurance. The right to maintain the action, upon the facts stated in the complaint, was decided, in advance of the hearing of the testimony, in favor of the plaintiffs. 19 Misc. Rep. 248.

The evidence discloses that the defendants to the number of about seventeen are engaged in the business of fire insurance under contracts which provide for limited personal liability, claiming the right by assignment from the original associators, Parsons, Broderick and Holt. These three individuals, on the 11th of April, 1892, in one afternoon prepared the papers for the organization of thirty different Lloyds associations, identical in form except as the names differed, with one attorney and manager for the whole; one of the associations being now named the "People's Fire Lloyds" and managed by the defendants. The original organization was not made for the *bona fide* purpose of conducting insurance business by the associators through the thirty different organizations, but for the purpose of sale to purchasers to be found. Four small policies were issued by the People's Lloyds, all within the circle of the associators and business friends. These policies were not issued for the purpose of starting and continuing a general insurance business, but to effect a nominal use of the apparent purpose of the organization. At a meeting of the associators held in July, 1892, it was decided that it would be inadvisable to issue any more policies until the general fire business should undergo further improvement. On the 14th of March, 1894, the three associators elected Benjamin F. Rhoades and several others as associate members, and then resigned pursuant to the terms of the transfer of the rights of the original associators. Whether there was anything to be transferred, which gave the defendants the right to continue the business of fire insurance in this state, depends upon whether, from the 1st

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day of October, 1892, the original associators were actually engaged in the business of insurance within this state.

By chapter 690 of the Laws of 1892, it was declared that no person, partnership or association should engage as principals in the business of insurance in this state unless possessed of the capital required of insurance corporations, and unless they had made deposits with the superintendent of insurance of securities to the same amount required from corporations, and a certificate had been issued by the superintendent to them. By chapter 684 of the Laws of 1894, amending section 57 of chapter 690 of the Laws of 1892, it was provided that the provisions referred to should not apply to individuals, partnerships or associations known as Lloyds, or as individual underwriters, which on the 1st day of October, 1892, were lawfully engaged in the business of insurance within this state and not required to report to the superintendent of insurance.

This saving clause applied undoubtedly to those who had invested capital, means and labor in the creation of an association for the honest purpose of effecting insurances, and had proceeded to such an extent as to be actually engaged in that business on the 1st day of October, 1892. The exception of this class of persons from the general public policy of the state, as announced by chapter 690 of the Laws of 1892, was designed to relieve from the hardship of the prohibition those who had in good faith acquired property rights, and earned somewhat of a good will in the insurance business by their efforts prior to the date named. The general policy of the state remained the same as to all others, and was announced by statute in recognition that the business of insurance had become so expanded as to be a matter of public concern, and to require the deposit with the superintendent of considerable capital to secure the public dealing with insurance companies, and the supervision of the superintendent of insurance as to the management of the different companies. The State had for many years maintained an insurance department, as one of the public departments of the State, for the supervision of the business of insurance, and had assumed that the franchise or right to offer to the public satisfactory and secure provision against loss was one within the discretionary control of the legislature. University v. People, 99 U. S. 309; Thompson v. People, 23 Wend. 547; State v. Ackerman, 51 Ohio St. 163; Commonwealth v. Vrooman, 164 Penn. St. 306.

Can this present organization be said fairly to come within the spirit of the exception to the declared public policy of the State?

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Insurance companies are organized for the purpose of making insurances, and not for the purpose of sale. When individuals through the form of a corporation, or any other associated enterprise, create a company whose defined objects are the effecting of insurances, the presumption is that the business in which they are actually to engage is that to which the objects are avowedly devoted. In the present case, from the wholesale organization of many associations at the same time by three individuals, and the suspension of business by the original associators, it becomes plain that insurance was only to be carried on as an actuality from the time when the associators should separate themselves from the enterprise, and the real insurers of property take charge of the affairs of the company. Until that event occurred the original associators were not actually engaged in the business of insurance within the state, and so do not come within the exception to a beneficent public policy, devised for the protection of the insuring public, and have no equitable claim to be freed from the prohibitions expressed in the law, or to exercise a monopoly or privilege with freedom from liability, shared by very few citizens of the state.

No sale of such an enterprise can convey a better right than the associators themselves had; nor can the action or recognition of any of the executive officers of the state legalize a business declared unlawful by its general laws.

Judgment is directed in favor of the plaintiffs, adjudging the defendants to be unlawfully transacting the business of insurance in the state of New York as the People's Fire Lloyds, and unlawfully claiming and exercising a privilege of franchise not granted by the laws of the state, and for an injunction restraining the issuance of policies by said persons until compliance with the conditions imposed by law, with costs to the plaintiffs against the defendants.

Ordered accordingly.

FRED L. LAVANBURG, Plaintiff, *v.* ISAAC PFEIFFER, Defendant.

(Supreme Court, New York Special Term, May, 1898.)

Trade-marks — Hostile use of initial adjectives qualifying colors.

On a motion for a preliminary injunction in an action, it appeared that, upon the dissolution of the partnership of the parties for the manufacture and sale of dry colors, the plaintiff bought the assets

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including, among other things, the trade names "Oriole Vermilion" and "Peerless Green" and that the defendant, who had subsequently embarked in the same manufacture, was using the terms "O. Vermilion" and "P. Green."

Held, that even assuming the plaintiff's right to both adjectives, he could not prevent the defendant from using the initials instead of the name, as such a use was not calculated to deceive the public, or at least, so much of it as used its eyes and ears.

MOTION for a preliminary injunction brought by plaintiff to restrain the defendant from selling any dry colors under the trade names "Oriole Vermilion" or "Peerless Green," and from using the initials "O." or "P." Plaintiff claimed that he was the owner of said trade names; that defendant used the terms "O. Vermilion" and "P. Green," and that in three or four instances his salesmen made sales under the verbal description of "Oriole" and "Peerless." The moving affidavits are met by absolute denials.

Spiegelberg & Wise, for plaintiff.

A. L. & S. F. Jacobs, for defendant.

COHEN, J. The plaintiff and the defendant were formerly copartners, engaged in the business of manufacturing and selling dry colors. The copartnership was dissolved December 24, 1896, and the plaintiff bought the assets of the business, including the trade names and marks, and since that time the plaintiff alone, and the defendant, either alone or associated with others, have continued in the same kind of business. Among the trade names of the old firm were those of "Oriole Vermilion" and "Peerless Green," which names the plaintiff now seeks to enjoin the defendant from using. It nowhere appears from the affidavits that on any manufactured article the defendant had used either of those names. It does appear that he has used "O. Vermilion" and "P. Green;" but even assuming the plaintiff's right to both adjectives, he would not be warranted in preventing the defendant from using the initials instead of the name, as such a use is not calculated to deceive the public, or, at least, so much of it as use their eyes and ears.

It does appear by affidavits, which are flatly contradicted, that products made by the defendant were sold in small quantities, and in three or four instances under the verbal description of "Oriole" or "Peerless." Under such circumstances, it does not seem to me

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that the plaintiff has made out a case for a preliminary injunction. As the defendant has expressed his willingness to accept short notice of trial for the March Term, the plaintiff can have a speedy trial, where witnesses will be examined and cross-examined, and then obtain injunctive relief if he then be found entitled thereto.

Motion denied.

WILLIAM BRACKEN, Plaintiff, *v.* THE ATLANTIC TRUST CO. et al., Defendants.

(Supreme Court, New York Trial Term, May, 1898.)

Action against a trustee corporation — Conversion — Former adjudication.

In April, 1892, the United E. T. Co. guaranteed to the Mercantile Trust Co., as trustee by mortgage for certain bondholders of the Julien E. T. Co., payment of these bonds and also deposited with the Atlantic Trust Co. 30,000 shares of the stock of the Consolidated E. S. Co. as security for the guaranty. The Mercantile Trust Co., for a default in the payment of the Julien E. T. Co. bonds, subsequently foreclosed and sold under its trust mortgage and, realizing very little by the sale, demanded of the United E. T. Co. performance of its guaranty; but this was refused. In November, 1892, the Mercantile Trust Co. demanded of the Atlantic Trust Co. the shares deposited with it as security and the demand being refused, brought an action against the Atlantic Trust Co. simply to compel it to deliver the stock. The Mercantile Trust Co. succeeded in its action but, during the four years of its pendency, the stock fell in value from $4 per share to almost nothing, all of it having been sold in March, 1896, after judgment, for $2,100. Subsequently the assignee of 102 bonds of the Julien E. T. Co. brought the present action, the Mercantile Trust Co. refusing to sue against the Atlantic Trust Co. to recover damages for its alleged wrongful detention of the stock during four years and for its refusal to perform its duty as a trustee for the bondholders. The Atlantic Trust Co. pleaded in bar the former action brought against it by the Mercantile Trust Co.

Held, that as the former action was merely one to compel a delivery of the stock and one in which no damages were claimed and that as the present cause of action was not perfected until the breach of duty upon the part of the Atlantic Trust Co. had ceased by its return, whether voluntary or compulsory, of the stock, and as it was

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not possible until after such return to determine definitely the extent of the injury, the former action was not a bar to the present one and could not be allowed to prevent the plaintiff from now litigating an independent phase of the subject-matter which had not been heretofore presented to the court.

That the measure of damages was the difference between the value of the deposited shares at the time of their conversion in November, 1892, and that value upon their return in March, 1896, together with accrued interest for the wrongful detention.

MOTION by Atlantic Trust Co., one of the defendants, to set aside verdict in favor of plaintiff for $151,142.82, and for a new trial, on alleged errors of law.

Ward, Hayden & Satterlee, for motion.

Hornblower, Byrne, Taylor & Miller, opposed.

MCADAM, J. Plaintiff sued to recover $180,000 damages claimed to have been sustained by him and his assignors, holders of 102 bonds of the Julien Electric Traction Company, by reason of the wrongful refusal of the defendant Atlantic Trust Company to deliver up 30,000 shares of stock of the Consolidated Electric Storage Company, deposited with it as security for the fulfillment of a guarantee of payment of said bonds, under the following circumstances: In April, 1892, a corporation known as the United Electric Traction Company, by an instrument in writing, guaranteed to the Mercantile Trust Company, as trustee for the holders and owners of said 102 Julien bonds, the payment thereof, and as security for the performance of the guaranty deposited with the defendant Atlantic Trust Company, the 30,000 shares of the capital stock of the Consolidated Electric Company aforesaid. Default was subsequently made in the payment of interest on the 102 Julien bonds, by reason whereof the principal amount thereof became due, and the mortgage securing the bonds was foreclosed by the trustee, the Mercantile Trust Company. The mortgaged property when sold realized for the bondholders $1,488.56. The Mercantile Trust Company thereupon demanded of the United Electric Company the payment of the bonds pursuant to its agreement of guarantee, which was refused. In November, 1892, the Mercantile Trust Company, acting in behalf of the holders and owners of the 102 Julien bonds,

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demanded of the Atlantic Trust Company, for the use of the Julien bondholders, the 30,000 shares of the Consolidated Electric Company stock, deposited with it as security for said guarantee. The Atlantic Trust Company refused to comply with the demand, and the Mercantile Trust Company was obliged to bring suit in equity to enforce a delivery of the stock, which was finally delivered over in March, 1896, by force of a decree made in said suit requiring such delivery. The stock was thereafter, to-wit, in April, 1896, duly sold under the order of the court, at auction for $2,100. Excepting this sum, nothing has been paid on the 102 Julien bonds. The Julien Company and the United Electric Company became insolvent, and had no assets whatever. The theory of the plaintiff's action was that if the Atlantic Trust Company had performed its duty as trustee, and complied with the demands made upon it in November, 1892, the 30,000 shares of Consolidated Electric stock could then have been sold for $4 a share or $120,000, that being the market price at that time, that in consequence of the detention of the stock until March, 1896, its value had depreciated to $2,100, the sum it brought at the auction sale held in the month following, and that the expense of obtaining possession of the stock, an element of damage (Bennett v. Lockwood, 20 Wend. 223; McDonald v. North, 47 Barb. 530; Davis Sewing M. Co. v. Best, 50 Hun, at p. 80), exceeded what the stock sold for. The court charged the jury that the plaintiff had a cause of action, and that the measure of damages was the difference between the value of the bonds at the time of conversion in November, 1892, and their return in March, 1896, with the accrued interest for the wrongful detention, and the jury awarded the plaintiff as damages $151,142.82. The evidence fully sustains the award made, and as the plaintiff's property in the 102 Julien bonds fully equals that amount, even after crediting the $1,488.56 realized on the sale, it cannot be said that the judgment is excessive. The action was brought in the name of the plaintiff because the Mercantile Trust Company, the trustee, declined to bring it, and that company was in consequence made a party defendant. (Code, § 448.) No objection is made on this account to the form of the action or the plaintiff's right to maintain it. The real defense strenuously urged was that the judgment in the equity suit brought by the Mercantile Trust Company, for the possession of the 30,000 shares of stock, is a bar to this action, because, as it is claimed, the relief demanded here could have been had there, that the defendant should not be vexed twice for substantially the same cause, and

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that there could be but one recovery in respect to said stock. The judgment of a court of competent jurisdiction directly on the point is, as a plea in bar and as evidence in certain cases, conclusive between the same parties, or their privies, upon the same matter directly in question in another suit. The proposition is whether this principle can be applied to the present controversy. The rule is that an estoppel requires strict proof. A fact cannot be held to have been adjudicated in a former suit unless it so expressly appears by the record, or, at least, is clearly shown by evidence *aliunde* that it was determined. In other words, a judgment is conclusive upon the parties thereto only in respect to the grounds covered by it, and the law and facts necessary to uphold it. (See cases collated in note to 23 Abb. N. C. 283, et seq.) "It is only the material, relevant and necessary facts which are decided in an action that are conclusively determined thereby. * * * It is final as to such facts as are litigated and decided therein, which have such a relation to the issue that their determination was necessary to the determination of the issue." (Lance v. Shaughnessy, 86 Hun, at p.p. 414, 415; House v. Lockwood, 137 N. Y., at p. 268; and see Fairchild v. Edson, 154 id. 199.) Whether the plaintiff could have had the same relief under the pleadings in the first action as was demanded in the second, is one of the tests of a former adjudication. (Stannard v. Hubbell, 123 N. Y., at p. 531.) "In pleading a former adjudication, it is necessary that the plea contain an averment, in some form, that the matter now in controversy was actually determined in the former suit, or else that it might have been litigated under the issues then joined." (9 Enc. of Pl. & Pr. 622.) The rule allowing the plea in bar was intended to prevent vexatious litigation and is rigidly enforced in common-law actions, but not in equity cases where the courts having ample power so to mold the relief granted as to prevent injustice, will not enforce it unless equity in the particular case requires it. (O'Dougherty v. Remington P. Co., 81 N. Y., at pp. 499, 500.) No damages were claimed in the suit by the Mercantile Trust Company, so that the subject of the right thereto was neither litigated nor determined there and could not be, for it was not one of the issues to be tried. The object of that suit was to take the subject of the trust out of the hands of the Atlantic Trust Company and place it under the control of the court for execution. It was practically a proceeding to remove from office a trustee for breach of duty, and culminated in that end. Such a proceeding can hardly operate as a bar to an action against the trustees for malfea-

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sance while in office, and such is in effect the legal position of the parties here. The defendant relies upon Commerce Ex. Nat. Bank v. Blye, 123 N. Y. 132, wherein it appears that the plaintiff brought an action of replevin to recover the possession of forty-six coupon bonds of the West Point Manufacturing Co., with damages for the detention thereof, in which the plaintiff succeeded in obtaining judgment for possession, with substantial damages to the time of trial. The defendant gave an undertaking by means of which he retained possession of the property, not only up till the time of judgment, but thereafter by stays upon appeal. The plaintiff having ultimately succeeded, brought a new action to recover the depreciation of the property between the time of trial and the final return of the property, and the court held that such an action was not maintainable, that there could be but one recovery of damages, which was already had, and that the law did not authorize a new action to recover for depreciation after judgment while the property was virtually in the custody of the law pending the appeal taken by the defendant. It is impossible to apply the principle decided in that case to this one. McCarthy v. Hiller, 26 App. Div. 588, presents the question involved more distinctly. There it appeared that the plaintiff had exchanged some real estate with the defendant, and thereafter brought suit to set aside the exchange on the ground of fraud, and recovered judgment restoring to him the property which he had previously conveyed. After securing that judgment, the plaintiff brought another action to recover rentals collected by the defendant while in possession of the property. The question was whether the former judgment was a bar. The Court said: "It is not sufficient that the action should be between the same parties and in respect to the same property; it must be shown that the particular cause of action has been before the court, and that it was passed upon in arriving at the judgment of the court. Suppose, for instance, that the defendant, while in the fraudulent possession of the property, had maliciously destroyed the plumbing or had removed the mantels or had materially deteriorated the value of the premises, which facts were unknown at the time of the pendency of the original action, would it be maintained that a previous adjudication of a controversy, in respect to the title, had disposed of an action for damages? Obviously the mere fact that an action has been determined between the parties which involved the same premises, is not a bar to an action to recover money which came into the possession of the defendant by reason of his presumed ownership of the

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property. * * * all collateral questions necessarily arising in the litigation are deemed to be merged in and determined by the judgment of the court; but this does not apply to questions which were not before the court, and which are in themselves sufficient to sustain a separate cause of action." One of the first doctrines in the law of merger is that the precise matter in controversy in the second suit could in the nature of things have been the subject of controversy in the first suit. The cause of action in the second suit was not perfected until the breach of duty by the Atlantic Trust Company had ceased through the return of the stock, and whether it came back pursuant to judgment or by the voluntary act of the defendant makes no legal difference. The rule applicable to trover, trespass and replevin is, that "Where, however, the injured party accepts reparation, it operates as a reduction of damages. Thus where goods wrongfully taken from the owner are returned to him and accepted, damages are reduced by the value of the goods when accepted" (Sedgwick on Dam. [8th ed.], §§ 55, 494; 3 Sutherland on Dam. 528; Hibbard v. Stewart, 1 Hilt. 207; Bates v. Clark, 95 U. S. 204; 4 Am. & Eng. Enc. of L., 125, 126; Brewster v. Silliman, 38 N. Y. 423, 428; 6 Wait's Act. & Def. 220) or, as stated in the syllabus to Bowman v. Teall, 23 Wend. 306, "Where common carriers have been guilty of negligence whereby the owner of goods has sustained injury, the subsequent acceptance of the goods by the owner is no bar to an action; but may be given in evidence in mitigation of damages." See also Sedgwick on Dam. (8th ed.), § 536. When the stock was returned by the Atlantic Trust Company, in March, 1896, the extent of the injury became for the first time definitely known, and the right of action now being prosecuted, then became complete. The principle of estoppel by record, that no one shall be vexed twice for the same cause, is inapplicable here. The Atlantic Trust Company held the 30,000 shares of stock as trustee for the Julien bondholders, with the active duty, upon default of the guarantor, of so disposing of or dealing with the stock as in the best manner to afford security to the bondholders. The duties were more than those of a bailee and amounted to those of a trustee. Trusteeships was the business of the institution. The certificate of stock was made out in its name "as trustee." Use of the certificate in any way could only be effective upon the indorsement of the Atlantic Trust Company as trustee, upon the back of the certificate. One of two courses was open to the defendant, either personally to dispose of the stock for the benefit of the bondholders, or else to deliver over the certificate

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therefor, duly indorsed to the Mercantile Trust Company, which was another trustee for the bondholders, stated to be such in a mortgage securing the bonds as well as in the guaranty, the performance of which the bond was given to secure. The Atlantic Trust Company declined to adopt either course, whereupon the Mercantile Trust Company, as trustee, at the request and for the benefit of the holders of the Julien bonds, filed its bill in equity, praying for a decree that the stock be disposed of pursuant to the direction of the court. Judgment followed accordingly, the Atlantic Trust Company being directed to deliver the stock to the Mercantile Trust Company, "for the purposes aforesaid," which was a sale under the direction of the court for the benefit of the bondholders who obtained no other benefit from that adjudication. The detention of the stock by the Atlantic Trust Company from 1892 to 1896, and the refusal of that company to perform its duty as trustee, caused great loss to the bondholders of the Julien Company, who have no means of redressing the wrong, except by this action. The technical doctrine of merger is, therefore, invoked by the defendants to preclude the plaintiff from litigating an independent phase of the subject-matter not before presented to the court, and neither litigated nor decided in the former action, which is carrying the rule further than any principle of substantial justice requires. For these reasons the motion for a new trial must be denied.

Motion denied.

LEWIS E. ST. JOHN, Plaintiff, *v.* CHARLES EBERLIN, Defendant.

(Supreme Court, New York Trial Term, May, 1898.)

Stock corporations — Failure to furnish a verified "statement of its affairs" — Penalty — Laws of 1892, chap. 688, § 52.

The furnishing to a stockholder by the treasurer of a stock corporation of an unverified "statement of its affairs," after a demand for a statement under oath, made by the stockholder pursuant to section 52 of the Stock Corporation Law (Laws of 1892, chap 688) and the refusal of the treasurer to furnish any other statement, although the defect was pointed out to him, subjects him to the statutory penalty of $50 for a failure to furnish a legal statement and to the further penalty of $10 for every day's neglect, in furnishing a legal statement, up to the time when an action for the penalty is begun and, this, however long the stockholder may delay in bringing his action.

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ACTION to charge treasurer of the Equitable Stock Company with the statutory penalty for failure to deliver to the plaintiff as a stockholder of said company, a financial statement of its condition.

John O'Connell, for plaintiff.

Charles Fox, for defendant.

MCADAM, J. On June 24, 1896, the plaintiff purchased 125 shares of the Equitable Stock Company, and on the following day served a written demand on the defendant, as treasurer, "for a particular account, in writing, under oath, of all the assets and liabilities of the company." The transfer was entered on the corporate books, and the plaintiff became a stockholder for all legal purposes See Stock Corp. L., § 29; Rosevelt v. Brown, 11 N. Y. 148; U. S. Trust Co. v. U. S. F. Ins. Co., 18 id. 199; Johnson v. Underhill, 52 id. 203; Shellington v. Howland, 53 id. 371, 376; Vail v. Hamilton, 85 id. 453, 458; Cutting v. Damerel, 88 id. 410, 416. On July 18, 1896, the defendant sent the plaintiff the proper statement, but not verified by oath as required by statute. The plaintiff testified, and the jury have found, that the plaintiff pointed out this defect and insisted upon a sworn statement, and that the defendant took and maintained the position that the unsworn statement furnished was all the law required and all the plaintiff would get. The statute provides that "Stockholders * * * of any corporation, other than a moneyed corporation, * * * may make a written request to the treasurer * * * thereof for a statement of its affairs, under oath, embracing a particular account of all its assets and liabilities, and the treasurer shall make such statement, and deliver it to the person presenting the request, within thirty days thereafter," etc., and further provides that "For every neglect or refusal of the treasurer * * * to comply with the provisions of this section he shall forfeit and pay to the person making such request the sum of $50, and the further sum of $10 for every twenty-four hours thereafter until such statement shall be furnished." 2 R. S. (9th ed.), p. 1024, § 52. The obvious purpose of the statute was to enable stockholders not in control to obtain for their protection and guidance a true statement of the financial condition of the corporation, that they might ascertain the value of their investment and conserve their interests according to the best lights obtainable. To accomplish this end and make the statement trustworthy, it must not only be made by the treasurer, but verified by his oath. The oath is made an essential part of the statement and without it the

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statute is not complied with. While it may be waived by the stockholder for whose protection it is intended (McCrea v. Bedell, 9 Misc. Rep. 372; 60 N. Y. St. Repr. 616), it was not waived by the plaintiff; on the contrary, it was insisted upon by him. The popular impression that whenever a statute penal in its character is the subject of action or defense, courts are bound to find some means of avoiding or mitigating its effect is fallacious. Statutes are to be enforced even though highly penal. They are not on that account to be impaired and ought not to be construed so as to defeat the legislative aim and purpose. Cotheal v. Brouwer, 5 N. Y. 562; Endlich on Statutes, § 329; People v. Quant, 12 How. Pr., at p. 91. "We are undoubtedly bound," says Mr. Justice Story, "to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs, to be within the remedial influence of the statute." Sedgwick on St. L. (2d ed.), 282. When a statute, as this one does, imposes a specific obligation upon a corporation official, courts cannot alter or lessen the penal consequences of default, for that is matter of legislative wisdom and not judicial concern and policy. There is an apparent disposition to avoid cumulative penalties, whenever the statute is capable of an interpretation that permits the courts to hold but one penalty recoverable, but this course cannot be indulged in when the act invoked gives a separate and distinct penalty for every offense or for every day's delay as is the case here. Suydam v. Smith, 52 N. Y. 383. The defendant had the power to stop the running of penalties by complying with the statute, which in plain language provides that until he does yield compliance the penalties are to accumulate. True, the plaintiff might have brought his suit sooner and thereby put a limit to the amount of his recovery, but there seems to be nothing which requires a plaintiff pursuing a statutory remedy given for his protection, to consult the interests of the wrongdoer whose violation of duty furnishes the very grievance sought to be redressed. The plaintiff, by force of the statute, is entitled to recover not only the penalty of $50 for failure to furnish the required statement, but the further sum of $10 for every day's neglect to furnish the same, up to the time of the commencement of the action, aggregating $1,760. Judgment on the special verdict is, therefore, rendered for this amount, with costs.

Judgment accordingly.

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ST. MARY'S CHURCH, OF POTSDAM, NEW YORK, Plaintiff, *v.* THE NATIONAL BANK OF POTSDAM, AND JOSIAH VAN VRANKEN, as Receiver, etc., Defendants.

(Supreme Court, St. Lawrence Special Term, May, 1898.)

Action against a receiver of a national bank upon an impressed trust — An attempted payment by its cashier, not executed — Preferential payment.

At half-past 3 o'clock in the afternoon of January 25, 1897, the treasurer of a church presented for payment to the cashier of a national bank certain certificates of deposit issued by it, was directed by the cashier to indorse them and had indorsed two of them, when he was called back to the cashier's window by the president who forbade payment, although the bank then had funds sufficient to pay, and thereupon the bank suspended definitely. The comptroller of the currency appointed a receiver during the next month and the present action was brought against the receiver to recover the deposit on the ground of a trust to the extent of the deposit by the agreement of the cashier to pay. The receiver demurred to the complaint.

Held, that as the attempted payment was not fully executed on January 25, 1897, no fund was actually set apart for the plaintiff and that, as against the receiver, it was not entitled to any preference over other creditors; nor did it show any equities entitling it to a preferential payment.

DEMURRER to the complaint.

A. X. Parker, for plaintiff.

Thomas Spratt, for defendants.

RUSSELL, J. The plaintiff seeks a preference in payment out of the funds of an insolvent national bank to the amount of $8,900, with interest, on the ground of a trust impressed to that amount by an agreement of the cashier to pay, which was partially accomplished, but prevented by the appearance of the president of the bank, who forbade its completion. The facts, as they appear in the complaint to which the demurrer is interposed are as follows: The National

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Bank of Potsdam closed its doors and stopped business at half-past 3 in the afternoon of January 25, 1897, and in February following Josiah Van Vranken was appointed receiver by the comptroller of the currency.

During the six months preceding the failure of the bank the plaintiff deposited various sums, in the aggregate to the amount of $8,900, taking certificates of deposit. On the afternoon of the 25th of January, about half-past 3 o'clock, the treasurer of the plaintiff presented the certificates of deposit to the cashier of the bank for payment, was directed to indorse the certificates, and had indorsed two of them when he was called back to the cashier's window in the bank, where he saw the president of the bank who forbade the payment, although the bank at that time had $18,000 in currency wherewith it might have paid the certificates, and the paying officer was ready to pay the same, and upon such refusal to pay the bank closed its doors as a bank and suspended business.

The only case to which I am cited by counsel for the plaintiff is that of Davis v. Elmira Savings Bank, 161 U. S. 275, and the reasoning in the opinion of the court at pages 288 and 289. But the decision there adjudged the provision for a preference in the distribution of the funds of an insolvent national bank in favor of a savings bank, provided for by the laws of the state of New York, to be void as in conflict with United States laws requiring the distribution ratably to the creditors. The opinion refers to the cases of Scott v. Armstrong, 146 U. S. 499; San Diego County v. California Nat. Bank, 52 Fed. Repr. 59, and Massey v. Fisher, 62 id. 958. Those cases, however, simply decide that the receiver takes only that which belongs to the bank, and that, as between the bank and third persons, equitable considerations may diminish the apparent amount of assets going to the receiver by the just claims of ownership or set-off of third persons. The only application of this principle to the present case would be to hold that the sum of $8,900 had been equitably appropriated, and set aside as the property of the plaintiff by the transaction which took place on the last day of the bank's business life.

It cannot be held that, as a legal act, there was a delivery of the money to the plaintiff so that the currency which was separated from that belonging to the bank became the actual property of the plaintiff. The attempted act of payment was not fully executed.

Nor can it be claimed as an equitable appropriation on the principle that equity regards that as done which ought to have been done. The plaintiff has no equitable claim to a preferential payment. Just

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and equitable considerations require a division of all of the property of insolvent banks among its creditors ratably. The controversy is not between the plaintiff, a creditor, and the stockholders, the owners of the bank; it is between the plaintiff as a creditor and the receiver as trustee of all the creditors. By so much as the bank fails to pay one hundred cents upon the dollar on a claim of this amount, all of the other creditors would suffer in case of payment in full to the plaintiff of its claim. There are, therefore, no equitable considerations which justify the payment to the plaintiff in full and a consequent diminished distribution to the other creditors.

It is unnecessary to consider the farther question as to whether a bank which, by reason of inability to pay its claims in full, terminated its business career on the day in question, and over whose property a receiver was immediately appointed for distribution as in case of insolvency, could under the statutes of this state have actually made the payment in question, knowing as the officers did its precarious condition, and that such a payment would be a preference to one creditor over the others.

Let there be a judgment sustaining the demurrer, with costs.

Demurrer sustained, with costs.

SAMUEL CAMERON, Plaintiff, *v.* THE NEW YORK ELEVATED RAILROAD CO. et al., Defendants.

(Supreme Court, New York Trial Term, May, 1898.)

Action in equity against elevated roads — Measure of damages where the plaintiff parts with his title, pending the action.

Pending an ordinary abutter's action in equity against elevated railroads in which damages to rental value were claimed as an incident, the plaintiff parted with his title and the action was thereafter tried, upon the single issue of rental damages, before a jury at a trial term, to whose calendar it had been transferred on motion of the defendants. This was the only trial and disposition of the action.

Held, that as equity had once acquired jurisdiction of the action it retained it, notwithstanding the jury trial, and that hence the plaintiff was not limited, by the rule of common law actions, to the recovery of such rental damages as he had sustained within six years prior to the commencement of the action, but might recover such damages up to the time when he sold the property.

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MOTION upon the judge's minutes to set aside the verdict herein, and for a new trial on the ground that the same is contrary to the evidence and contrary to law; also, because the verdict is excessive. Also, separate and special motion to set aside so much of the verdict as awards damages for injury to rental value subsequent to the commencement of the action.

Edward C. James, for motion.

Charles A. B. Pratt, opposed.

WERNER, J. This action was commenced on the 8th day of December, 1890. It was brought to restrain the defendants from maintaining, constructing or operating their elevated railroad or any part thereof in front of and adjoining the premises owned by plaintiff and known as No. 730 Ninth avenue in the city of New York and incidentally to recover damages for the injury to the rental value of plaintiff's premises caused by the construction, maintenance and operation of defendants' said railroad. The plaintiff acquired the title to said premises September, 1890, and retained the same until the 4th day of May, 1896. On the 8th day of February, 1898, an order was made by this court upon motion of the defendants, transferring this cause to the Trial Term calendar. The action was tried on the 10th day of March, 1898, before the court and a jury. The plaintiff claimed the right to recover for losses of rentals for a period of six years prior to the commencement of the action to the time of the alienation of said premises by the plaintiff. The defendants insisted that the plaintiff's right of recovery, if any, could only extend up to the time of the commencement of the action. The court, being in doubt as to which was the proper rule to follow, submitted to the jury the two periods separately; so that if, upon examination, it should be held it was improper to permit the plaintiff to recover for the time between the commencement of the action and the sale of the premises, this portion of the verdict, if any, could be set aside without disturbing the rest of the verdict, unless it should be necessary to set aside the whole verdict on other grounds. This method of procedure was agreed to by stipulation of counsel. After an examination of the whole case, we have arrived at the conclusion that the only question which it will be profitable to discuss upon this motion is whether the plaintiff is entitled in this action to recover for loss of

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rentals after the commencement of the action and up to the time of the sale of the premises by plaintiff.

The claim of the defendants' counsel is based upon the theory that the plaintiff, by parting with his title, has voluntarily deprived himself of all right to equitable relief; and being entitled only to the relief which is purely legal in its nature, the rule must prevail which limits the recovery to damages that accrued prior to the time of the commencement of the action. The contention of the counsel for the plaintiff is that, as this action was originally brought in equity, upon pleadings which entitled the plaintiff to equitable relief, the court on its equity side still retains its jurisdiction, even though the relief granted is purely legal in its character; and that hence the court has power to grant all the relief which the plaintiff shows himself entitled to down to the time of the trial. It is the settled rule that when a court of equity has jurisdiction of a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of the matters at issue. "To such an extent has the doctrine been carried that it has been declared that if the controversy contains any equitable features, or requires any purely equitable relief belonging to the exclusive jurisdiction of equity, or pertaining to the concurrent jurisdiction of equity and law, and a court of equity thus acquires a partial cognizance of the action, it may go on to a complete adjudication and establish purely legal rights and grant legal remedies, which would, otherwise be beyond the scope of its authority. Pomeroy's Equity Jurisprudence, §§ 181, 231, 242. So long as one of the grounds of equitable interference in this class of cases is the avoidance of a multiplicity of suits, this rule must prevail." McGean v. Met. El. R. R. Co., 133 N. Y. 16. This rule was applied by this court to this class of cases in Kane v. Man. Ry. Co., 42 N. Y. St. Repr. 415, in which Barrett, J., says: "The only other point calling for special consideration is the allowance for damages for injury to the rental value of the premises subsequent to the commencement of the action * * *. We think, however, that the damages were properly allowed. Rulings to the contrary were in common-law actions. In equity, however, complete relief is afforded, thus avoiding multiplicity of suits and circuity of action. To accomplish this, damages for loss of rental must be allowed down to the time of the trial."

There can be no doubt, therefore, that if the trial of this action had been continued on the equity side of the court, the plaintiff would have been entitled to recover such loss in the rental value of

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his property as was occasioned by the construction, maintenance and operation of defendants' elevated railroad for a period of six years before the commencement of the action down to the day when the plaintiff sold his premises, although such relief would be purely legal in its nature. The question then arises, whether the rule which now prevails in this court, that when there is nothing to be tried in actions of this kind except the question of rental damages the defendants are entitled to have that question tried by a jury, changes the nature of the action, so as to limit plaintiff's right of recovery to the time when the action is commenced.

This question has not, to our knowledge, been passed upon in any case where the defendants have availed themselves of their right to trial by jury. It has, however, been decided in Van Allen v. N. Y. E. R. R. Co., 144 N. Y. 179, and in Domschke v. Met. El. Ry. Co., 74 Hun, 442, the facts in which are like those in the present case. In each of said cases the issues were tried before a referee. In the Van Allen case the referee awarded damages from a date six years prior to the commencement of the action to the time of the conveyance. In the Domschke case, the referee awarded damages arising between the date when the plaintiff acquired title and the conclusion of the trial. In his discussion of this feature of the Domschke case, Follett, J., says: "In this State legal and equitable relief are administered by the same court, and when the action was begun the plaintiff had a good cause of action for equitable relief, and the fact that since that he has ceased to be entitled to such relief is not a sufficient ground for dismissing the action, and it should be retained for the purpose of assessing such damages as he is entitled to."

In the Van Allen case, the court was divided upon this question. But the prevailing opinion lays down the rule contended for by the plaintiff in the following language: "But some of my brethren are of the opinion that the principle does not apply where the party by his own voluntary act withdraws from the case the main fact which originally was the ground upon which equity jurisdiction attached, and they prefer to rest the judgment upon the defendants' stipulation to refer, which was so drawn, apparently, as to give consent to a trial before the referee of either the legal or equitable cause of action, or both. I have already said that the stipulation was sufficient to authorize the referee to try a cause of action, purely legal in its nature, but in order to authorize an award of damages, coming down to the time of the conveyance, it

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is necessary to show that he possessed equity jurisdiction also, and I think he did. The nature and character of the action is determined by the pleadings, and the complaint before the referee stamped this action indelibly as one in equity. The conveyance did not change the pleadings but only the nature and extent of the relief to which the plaintiff was entitled. The referee had the power to try whatever remained of the action upon the principles governing courts of equity, though nothing remained but a claim which of itself was originally one at law. I am unable to see any good reason for turning a party over to another court to recover a comparatively small portion of his claim, simply because he exercised the right of disposing of his property while he was in a court of equity seeking redress for an invasion of rights pertaining to that property. It is more in accordance with the general doctrines and practice of equity to grant relief as to all claims in the suit which the party still retained, and which had accrued to him at any time before the trial or the decree, than to require him to commence another action for that purpose. It appeared at the trial that the plaintiff had a valid claim for damages at the time of the conveyance which did not pass by it. That claim was embraced within the issues which the referee was appointed to determine, and the circumstance that the sole ground upon which the plaintiff was permitted to bring the action in equity had disappeared, did not affect the jurisdiction to render judgment according to the nature of the case so long as the order of reference was in force."

In the case of Pegram v. N. Y. El. R. R. Co., 147 N. Y. 149, the court, per Gray, J., in discussing defendants' waiver of the right to trial by jury, says: "Had the objection been raised in a proper way, or at the proper time, I think the defendants could have insisted upon a trial upon the law side of the court, as to the damage which the plaintiffs had sustained *up to the time of the conveyance of the property.* But not having done so, it was not error for the court to settle the litigation between the parties as far as it was entitled to do so, by the award of the rental damage sustained by the plaintiffs while holding the legal title to the premises."

While none of the cases referred to dispose of the specific question before us, they clearly establish the doctrine that the nature of the action is determined by the character of the relief to which a plaintiff is entitled when the action is commenced. But aside from the authorities, it seems to us that it would be utterly destructive

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of the doctrine that when equity acquires jurisdiction of an action for any purpose it may retain jurisdiction for all purposes, to hold that a defendant, by availing himself of his right to the trial of a specific question of fact, may convert the action from one in equity to one at law, and thus abridge the plaintiff's right of recovery.

There is no essential difference between an equity action in which some of the questions of fact are tried by a jury and one where all the issues are decided by the court or by a referee.

The provisions of section 970 of the Code of Civil Procedure seem to have been framed for the very purpose of obviating the question which has arisen here. "Where a party is entitled by the Constitution, or by express provision of law, to a trial by a jury, of one or more issues of fact, in an action not specified in section nine hundred sixty-eight of this act, he may apply upon notice, to the court for an order, directing all the questions arising upon those issues, to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues, to the trial of which, by a jury the party is entitled, to be distinctly and plainly stated. The subsequent proceedings are the same, as where questions arising upon the issues, are stated for trial by a jury, in a case where neither party can, as of right, require such a trial; except that the finding of the jury upon such questions, so stated, is conclusive in the action unless the verdict is set aside, or a new trial is granted."

We, therefore, conclude that, although the only question which remains in the case was a purely legal one and was tried in a court of law, the action is still an equity action and controlled by the practice and principles applicable to such actions.

Defendants' motion for a new trial is denied, with $10 costs.

Motion denied, with $10 costs.

CHARLES CHURCHILL et al., Respondents, *v.* THEODORE WAGNER et al., Appellants.

(City Court of New York, General Term, May, 1898.)

Costs, where the plaintiff is entitled to costs against one of several defendants but not against all — Code Civ. Pro., § 3229 — Negligence as a question of fact.

An action for alleged negligence in blasting rock, which damaged the plaintiffs, was brought to enforce the alleged joint and several

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liability of the defendants, who were a contractor and his subcontractor; and no relief was sought against one of them which was not claimed against the other. Both appeared by the same attorney and served joint answers, each of which was verified by both. A verdict was rendered in favor of the contractor and against the subcontractor, and thereupon the contractor entered a judgment for costs against the plaintiffs.

Held, that the true intent and meaning of section 3229 of the Code of Civil Procedure was that, if one defendant united in an answer with his co-defendant, or was united with him in interest, he could not recover costs, although no judgment was recovered against him, and that consequently the contractor was not entitled to costs.

That, where the evidence upon a pure question of negligence was conflicting, the decision of the jury must ordinarily be final.

APPEAL from a judgment of dismissal in favor of defendants also appeal from a judgment in favor of plaintiff, entered upon a verdict.

August P. Wagener, for appellants.

Eugene R. Darling, for respondents.

CONLAN, J. This case comes before us upon a cross-appeal, the plaintiffs appealing from a judgment of dismissal as to the defendant Wagner, and the defendant Lubecke appealing from a judgment against him, entered upon a verdict in favor of the plaintiffs.

The *gravamen* of the complaint is negligence of the defendants in blasting rock upon lands adjoining those of the plaintiffs and for damages claimed as a consequence thereof.

The defendant Wagner, a contractor and builder, entered into a contract to erect a building upon lands adjoining those of the plaintiffs on Washington avenue, New York city, and he sublet that portion of the contract which called for blasting rock and excavating for the basement or cellar to the defendant Lubecke, and it is claimed that in consequence of this subletting of the contract, Wagner was relieved of liability for the injuries inflicted, and the judgment in his favor proceeded on this theory of the case.

There was included in this judgment, costs to the amount of $108.68, and it is the contention of the plaintiffs' counsel that this award of costs is erroneous.

The defendants appeared by the same attorney and served joint answers.

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Each was verified by both defendants and we are of the opinion that section 3229 of the Code is an authority for this interpretation.

The provisions of that section touching the precise point here are that where the plaintiff is entitled to costs against one or more defendants, but not against all of them, none of the defendants are entitled to costs.

In that case costs may be awarded in the discretion of the court to any defendant, against whom the plaintiff is not entitled to costs, where he did not unite in the answer, and was not united in interest, with the defendant, against whom the plaintiff is entitled to costs.

The provisions of the old Code were to like effect. The action is against both defendants upon their joint and several liability and no other relief is sought against one than is claimed against the other.

Negligence charged was the negligence of both, and only because of the subletting to the defendant Lubecke can it be said that Wagner was not liable.

We think the true intent and meaning of the section quoted is that if one defendant unites in the answer with his codefendant or is united in interest, he cannot have costs in his favor on failure to recover a judgment against him, and so the authorities appear to decide.

It is distinctly held in Frazer v. Hunt, 18 Week. Dig. 390, by the Supreme Court, General Term, in this department, that the costs as to a successful defendant are made discretionary with the court when such successful defendant does not unite in the answer and is not united in interest, and in that case, because the defendant united in the same answer, it was held that the one having the judgment in his favor could not recover costs.

To the same effect was the case of Allis v. Wheeler, 56 N. Y. 50, and Sawyer v. Thurber, 14 Civ. Pro. 204.

We are, therefore, of the opinion that the judgment against the plaintiffs and in favor of the defendant should be modified or amended by striking out all provisions for the recovery of costs, so that the same may be a judgment in favor of the defendant Wagner, but without costs against the plaintiffs or either of them.

Proceeding now as to remaining appeal by the defendant Lubecke from the judgment entered against him upon a verdict, we are of the opinion that nothing appears in the record as a reason for disturbing the finding of the verdict. The question was one

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of negligence and it had no other element in it, and it was submitted to the jury upon all the evidence in the case, and no exception was taken to any portion of the charge.

In the recent case of Kenney v. Rhinelander, decided by the Appellate Division in the first department, and reported in 28 App. Div. 246, the court said upon the question of negligence and its submission: "The justice presiding at the trial could not have done otherwise than submit the issue of the defendant's negligence to the jury upon that conflicting evidence. It came down to a question of credibility, and although we might have been better satisfied were the verdict the other way, we have no right, upon such a record as this to substitute our judgment for the judgment of the jury."

It has often been said upon such conflicts of evidence as are presented, that an appellate court will not interfere with the verdict unless it plainly appears that it was the result of prejudice or clear misunderstanding of the facts, and the court said in conclusion, that to interfere with the verdict rendered, would be to usurp the functions of the jury.

We think that rule well applies to the case at bar so far as the judgment in favor of the plaintiffs is concerned.

These reasons lead us to the conclusion that the judgment against Lubecke should be affirmed.

FITZSIMONS, Ch. J., concurs.

Judgment affirmed, with costs.

THE MANHATTAN BRASS COMPANY, Respondent, *v.* EDWARD R. GILLMAN, Appellant.

(City Court of New York, General Term, May, 1898.)

Pleading — General denial — Want of consideration in a note.

Semble, that under a defense of a general denial, interposed to an action on a promissory note, a want of consideration cannot be proved, and that such a defense must be specifically pleaded.

APPEAL from a judgment in favor of plaintiff, entered upon a verdict and from an order denying a motion for a new trial.

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Henry C. Bryan, for appellant.

Baggott & Ryall, for respondent.

CONLAN, J. This is an appeal from a judgment, entered on the direction of a verdict in favor of the plaintiff and from an order denying a motion made by the defendant for a new trial.

The action is one brought on a promissory note and the defense is a general denial.

The plaintiff made its proof by offering the promissory note and the notice of protest in evidence.

The defendant objected generally, stating no ground of his objection. This was not sufficient and brings up nothing for review.

Plaintiff then rested and the defendant moved to dismiss the complaint without stating any ground or calling the court's attention to any error or omission, which motion was properly denied.

Defendant's counsel then called defendant as a witness, and attempted to show that the note was without consideration.

This was objected to by plaintiff's counsel, as follows:

"I object at the outset on the ground that an attempt to prove want of consideration or failure of consideration is not within the pleadings, that the defense is a general denial, and I submit that the defense of want of consideration should be specifically pleaded."

The objection was sustained. Defendant then moved to amend his answer and to withdraw a juror.

Both motions were denied, and as they were within the sound discretion of the trial judge will not be disturbed on appeal.

We find nothing in the record that warrants the reversal of the judgment and it must, therefore, be affirmed.

SCHUCHMAN, J., concurs.

Judgment affirmed, with costs.

FREDERICK KAFFEMAN, Respondent, *v.* LEOPOLD STERN et al., Appellants.

(City Court of New York, General Term, May, 1898.)

1. Parties — Defects appearing on the face of the complaint — Demurrer.

Where a defect of necessary parties appears upon the face of the complaint in an action, the defect is waived unless the objection is taken by demurrer.

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2. Patents — License fees must be paid by licensors who use a patent.

Licensors cannot use a patent and refuse to pay the license fees provided for by the contract of license.

APPEAL from a judgment in favor of plaintiff.

Daniel P. Hays, for appellants.

Joseph Kohler, for respondent.

O'DWYER, J. Assuming that "Lissauer and Sondheim" were necessary parties that fact appeared upon the face of the complaint, and the objection should have been taken by demurrer. Not having been so taken it was waived. Code Civ. Pro., § 488, subd. 5, and § 499; Fourth Nat. Bank v. Scott, 31 Hun, 301.

If it had been intended to restrict the licensors from manufacturing under the patent, such a covenant should have been inserted in the agreement.

Furthermore the defendants cannot use the patent and refuse to pay the license fees provided for by the contract. McKay v. Smith, 39 Fed. Repr. 556.

The judgment appealed from should be affirmed, with costs.

McCARTHY, J., concurs.

Judgment affirmed, with costs.

WILLIAM H. TERHUNE, Appellant, *v.* THOMAS J. DUNN, as Sheriff, etc., Respondent.

(City Court of New York, General Term, May, 1898.)

Replevin against a sheriff — Right to substitute his indemnitors against a wrongful levy.

The provisions of section 1421 of the Code of Civil Procedure, entitle a sheriff, against whom an action of replevin has been brought to recover property alleged to have been wrongfully levied upon by him under an execution, to procure the substitution, in his place and stead, of his indemnitors as defendants in the action.

THIS is an appeal from an order substituting the indemnitors of the sheriff in his place as defendants herein under section 1421 of the Code of Civil Procedure.

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On or about January 3, 1898, two executions were issued against the property of Alfred Ebenstein in favor of Louis Levy, one for the sum of $127.29 and the other for $1,527.50.

The sheriff levied, under and by virtue of said executions, upon certain property, some of which was afterwards claimed by the plaintiff herein, and this action in replevin to recover possession of some of said property so levied upon was commenced.

This defendant demanded a bond as against said claim and said action and all damages for the taking of said property, and costs, counsel fees and expenses; that thereafter such bond was given in the sum of $2,000, with Sanders B. Altmayer and C. W. Levy as sureties thereon.

A copy of said bond was served upon the attorney for the claimant (the plaintiff in this action), with notice of justification thereof, and said bond was duly approved by one of the justices of this court and filed with the clerk of said court.

This action was brought to recover possession of some of the property so levied upon and claimed as aforesaid, and the value of said property is stated to be $400; that thereafter a motion was made to substitute the indemnitors Sanders B. Altmayer and C. W. Levy as defendants herein, and an order was entered substituting said indemnitors.

It is from the order substituting said indemnitors that this appeal is taken.

Franklin Bien, for appellant.

Philip J. Britt, for respondent.

Per Curiam. The order appealed from is affirmed, with costs. Jakobi v. Gorman, 2 Misc. Rep. 190; Hart v. Sexton, 11 id. 446; Ullman v. Gorman, 21 App. Div. 616; Rosenblum v. Gorman, 21 id. 618.

Present: FITZSIMONS, Ch. J., CONLAN and SCHUCHMAN, JJ.

Order affirmed, with costs.

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THE PEOPLE ex rel. ALONZO BRYMER, Plaintiff, *v.* JOHN MORRISSEY GRAY, Defendant.

(Supreme Court, Kings Trial Term, June, 1898.)

1. **Charter of the Greater New York — Status of the former fire marshal of Brooklyn.**

The provisions of the charter of the Greater New York (Laws of 1897, chap. 378, §§ 127, 720, 727, 779) do not, *ipso facto*, invest the fire marshal of the former city of Brooklyn, although a veteran, with title to the same office, in the new city of New York for the boroughs of Brooklyn and Queens and, it seems, at most merely make him eligible to appointment by the fire commissioner of the new city to some office in the new fire department.

2. **Ouster from office by the people — Judgment.**

Where, in an action of ouster brought by the People, the relator shows no title to the office in question, he cannot have a judgment against the defendant even though the latter has no title. Where, however, in such an action brought partly in the interest of the relator, he fails to sustain the burden of showing title in himself, the defendant, after having shown a *prima facie* title, will be entitled to judgment, as, had he failed to show title, the People would be entitled to judgment against him, although the judgment would not proceed in the interest of the relator.

ACTION to oust the defendant from the office of fire marshal of the city of New York, for the boroughs of Brooklyn and Queens, and have the title of the relator thereto established.

Hugo Hirsh, for plaintiff.

William J. Carr, for defendant.

GAYNOR J.: The relator was appointed Fire Marshal of the city of Brooklyn in 1894. By an amendment to the charter of that city in 1889 (chap. 373, Laws of 1889) that position was created and made a public office in the Department of Fire, to be filled by appointment of the head of that department, viz., the Fire Commissioner. By a further amendment in 1892 (chap. 445) it was provided that the Fire Marshal "shall rank as a member of the uni-

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formed fire force of the department of fire, and shall be entitled to all the privileges and immunities thereof except to be placed on the pension roll of the firemen's insurance fund." Such was the official status of the relator when the charter of the new city took effect, and the new city became an entity.

By the charter of the new city there is by name a Fire Department, the head of which is the Fire Commissioner (sec. 720). Such commissioner is authorized to organize his said department "into such bureaus as may be convenient and necessary", one of which "shall be charged with the investigation of the origin and cause of fires, the principal officers of which shall be called fire marshals", and "a branch of said bureau shall be located in the borough of Brooklyn" (sec. 727). And again the said commissioner is authorized "to appoint and remove a fire marshal for the boroughs of Manhattan, The Bronx and Richmond, and a fire marshal to be seated in Brooklyn and to exercise his powers within the boroughs of Brooklyn and Queens" (sec. 779).

The relator claims that he was not merely "ranked" as a member of the "uniformed fire force" of the city of Brooklyn, by the said act of 1892, in order to enable him to enjoy certain privileges and immunities of the actual members of that force, but that he was made a member thereof in fact, and was therefore transferred with such force to the Fire Department of the new city, and vested with title to the said office of Fire Marshal for the boroughs of Brooklyn and Queens, by the following provision of the new charter, viz.: "The officers and members of the uniformed force and legally appointed firemen in the corporation formerly known as the mayor, aldermen and commonalty of the city of New York, and in the city of Brooklyn and in the city of Long Island City are hereby made members of the fire department of the city of New York, as hereby constituted, and shall be assigned to duty therein by the fire commissioner, with the rank and grade now held by them respectively as nearly as may be practicable."

That the office which the relator held in the city of Brooklyn ceased with the year 1897, seems beyond doubt. That this transferring provision of the new charter did not *ipso jure* invest him with title to the office of Fire Marshal of the new city for the boroughs of Brooklyn and Queens, any more than with title to the similar office for the boroughs of Manhattan, The Bronx and Richmond, seems equally clear. It only gave the right of appointment to office, not title to any particular office. If the relator was by the

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said provision transferred with the said uniformed fire force to the civil service of the new city, it was not to a particular position or incumbency, but to "be assigned" to one by the commissioner, for the said provision so says. He was no more transferred by force of the statute itself to a particular seat or incumbency, than was any other officer or member of the said force. All were brought into the civil service of the new city, to be assigned each to duty and place.

The relator being a veteran soldier also claims that he was transferred to the civil service of the new city, and vested with title to the particular office in question, by force of section 127 of the new charter, viz.: "All veterans either of the army or navy or the volunteer fire departments, now in the service of either of the municipal and public corporations hereby consolidated, who are now entitled by law to serve during good behavior, or who can not under existing law be removed except for cause, shall be retained in like positions and under the same conditions by the corporation constituted by this act, to serve under such titles and in such way as the head of the appropriate department or the mayor may direct."

But it will also be observed that this provision vests the persons to whom it relates with no title to any particular place or office in the new city, but only makes it the duty of "the head of the appropriate department or the mayor" to retain them in service and assign them to positions.

The relator having no title to the office in question, and therefore no right to demand it of the defendant, judgment of ouster cannot be given in his favor against the defendant, even if the latter had no right to the office. This being the only aspect in which the case has been presented at the bar, I might stop here. But as I understand it, our action by the People which has superseded the former writ *quo warranto*, may bear two aspects against the defendant. It may simply be by the People to oust the incumbent, as could only be the case anciently with the writ *quo warranto*, if my memory is true to me; or it may be by the People on the relation of an individual claiming title to the office, and partly in his interest, as is the present action. In the former aspect, the burden of proof is upon the defendant to show his title; in the latter, it is upon the plaintiff to show the relator's. The plaintiff having here failed to show the relator's title, the question may still remain whether the defendant has shown his, for otherwise the People would be entitled to judgment of ouster against him, though not in the interest of the

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relator. It is admitted that the defendant was appointed to the office by the Fire Commissioner, and duly qualified. This makes out a *prima facie* title in him, and no evidence to impeach it has been given. It was the legal duty of the said commissioner to appoint some competent person to the office. The defendant being competent, his appointment is not void. If the relator had a prior right of appointment, that did not confer title to the office upon him. It only enabled him to come forward and assert his right of appointment, and enforce it. Title to the office could come only from appointment and acceptance. There is no proof of title to the office in any one but the defendant.

Finally, the immunity from removal except for cause and after a hearing which the relator would have under the new charter (sec. 739), if a member of the uniformed fire force, and which he would have as a veteran soldier, whatever his position (chap. 821, Laws of 1896), is not relevant here. The relator's right to the office in question depends upon whether he has title thereto, not upon whether he would be irremovable except for cause and after hearing if he were in the office.

Judgment for the defendant.

CHARLES D. HAINES, Suing on his Own Behalf, etc., Plaintiff, *v.* THE KINDERHOOK & HUDSON RAILWAY CO., et al., Defendants.

(Supreme Court, New York Special Term, June, 1898.)

Corporations — Permanent reorganization committee — Powers of members after a sale of their interests — Distribution of stock held by a committee in trust.

In an action by a bondholder designed to compel the present distribution of 60 per cent. of the stock of a reorganized railway company, it appeared that the stock was held and was to be held, under a bondholders' agreement and plan of reorganization, by a committee until such time, not exceeding five years from the date of the sale of the property, "as the condition of the road shall, in their judgment, warrant the distribution thereof among the bondholders." The plan further provided that the nine members of the committee should constitute the first board of directors and that, after the reorganization of the board, the directors should *ex officio* form the committee. Two of the committee died and five disposed of all their

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stock and bonds in the reorganized company. Upon a motion for an injunction, pending the action, to restrain the five members from acting and also from voting on the stock for a new board of directors, Held, that the seven living members possessed conjointly the powers given to the committee by the plan, although five of them might have disqualified themselves from becoming directors; that, as trustees, all the seven members should vote upon the stock, that the two members who had not sold their interests, should be restrained from exercising the power of voting, to the exclusion of the others; and that the board thus elected would, as the reorganized board, become, by force of the agreement, *ex officio* the reorganization committee, with power of self perpetuation. *Semble,* that the present prosperity of the road afforded no valid reason for taking the road out of the hands of the committee and immediately distributing the stock.

APPLICATION for injunction.

John Delahunty, for motion.

Countryman, Du Bois & Bevans, opposed.

DALY, J. Plaintiff asks for an injunction restraining the individual defendants, during the pendency of the action, from acting any longer as a "Reorganization Committee" and voting as such upon 60 per cent. of the stock of the Kinderhook & Hudson Railway Co., under a certain bondholders' agreement and plan of reorganization, to which plaintiff and other bondholders of the former Kinderhook & Hudson Railway Company were parties. Under the plan of reorganization and distribution of stock and bonds of the new corporation, the reorganization committee and their successors were to hold 60 per cent. of the stock, with power to vote thereon "until such time, not to exceed five years from the date of the sale of the property, as the condition of the road shall, in their judgment, warrant the distribution thereof among the bondholders;" and the plan further provided that "the nine members of the reorganization committee shall constitute the first board of directors of the company, and after the reorganization of the said board the directors shall *ex officio* form the said committee." Two of the said nine members have died and five of those remaining have disposed of all their stock and bonds of the new company. It is the contention of the plaintiff that those five parties are disqualified to act as directors

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and consequently as committeemen, and have therefore no right to vote upon the said stock for a new board of directors. The question turns upon the construction to be placed upon the clause of the plan of reorganization last quoted, which provides that the members of the reorganization committee shall constitute the first board of directors of the company, and after the reorganization of the said board the directors shall *ex officio* form the said committee. Until the board is reorganized the original members of the committee continue to act as such and to exercise the power of voting upon the 60 per cent. of stock. What is the reorganization of the board contemplated by the agreement? The "said board" refers to the board of the new corporation constituted of the nine members of the committee. So far that original board has not been changed or reorganized in any way, nor is it easy to see how it can be, except by the election of a new board. It may be that such of the original committee as have parted with their stock have no right to act as directors, but that does not affect their right to act as committeemen, so long as they remain committeemen, and this, it would seem, they continue to do until the board of directors is reorganized by an election of a new board. There may be vacancies in the board, therefore, but not in the committee. The committee was the original trustee of the power of control, and is still in existence save as to the two members who have died, but as it is empowered to fill vacancies in its own body and to act by a vote of the majority, it is still competent to fulfill its duties. Under this view it would seem to be the duty of all the individual defendants to vote upon the trust stock, and the claim made by two of them in their separate answer, that Hosford and Stott alone now constitute the reorganization committee, because they retain their stock in the company, is not well founded; and an injunction should issue restraining them, as a minority of the committee, from exercising the exclusive right of voting the 60 per cent. of stock held in trust by said committee. It follows that in the seven individual defendants resides the sole power to elect the new board of directors. Their choice is confined, of course, to persons duly qualified. The latter will become, as the reorganized board under the agreement, *ex officio* the reorganization committee with power of self-perpetuation, subject to the limitations imposed in the agreement. That is precisely what was contemplated by the agreement, and the majority stockholders cannot now complain as long as the defendants act in good faith. The object of the agreement was to take the control of the new corpora-

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tion out of the hands of the majority, and to place it in the hands of a designated committee with virtual power of self-perpetuation until the expiration of the limit of five years. In short, the purpose of the agreement to which the plaintiff originally assented was to prevent the very thing which he now seeks to accomplish. The discretion vested in the committee by the agreement cannot be interfered with upon an allegation that they contemplate acting in the interest of the minority stockholders, without clear proof that such interests are plainly inimical to the interest of the corporation. The ultimate object of this action is to compel the immediate distribution of the 60 per cent. of trust stock. That is to be done when, in the judgment of the committee, the condition of the road shall warrant it. The present prosperity of the road is no valid reason for taking that discretion out of the control of the committee, but rather the contrary. The members of the committee seem to have been originally trusted as individuals, irrespective of their financial interest in the old or new company, for the bondholders' agreement, which was the foundation of the reorganization, authorizes their acquiring an interest in the property or in any syndicate formed for effecting a reorganization. This implies that they were not stockholders or bondholders when originally selected as trustees, and is adverse to the contention that they become disqualified to act when they cease to be stockholders. The injunction as against the defendants, other than Hosford and Stott, is dissolved. The two defendants named are enjoined from voting otherwise than with all the other individual defendants as a committee upon the 60 per cent. of stock in question. The motion to continue the injunction is otherwise denied. Ten dollars costs of motion to plaintiff against the defendants' answering.

Ordered accordingly.

EUGENE F. HEAGNEY, Appellant, *v.* LE ROY HOPKINS et al., Respondents.

(Supreme Court, Appellate Term, June, 1898.)

Mechanic's lien — Action by subcontractor on bond of contractors — Bar — Bond.

After a lien filed by a subcontractor against certain premises had been discharged by a bond given to him by the contractors, the latter foreclosed their own lien and recovered against the owner a judg-

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ment, which established both liens. The owner appealed and gave security to stay execution but, before his appeal had been heard, the subcontractor brought the present action upon the bond.

Held, that as the bond was given by the contractors and not by the owner, the appeal and stay, obtained by the owner, were not a bar to the present independent action against the contractor as principal debtor and against his sureties, standing as strangers to the owner.

The bond executed by the contractors was conditioned to "pay any and all judgments which may be rendered against said property" in favor of the subcontractor.

Held, that the bond did not contemplate an absolutely final irreversible judgment and that the judgment in the foreclosure proceedings brought by the contractors, although appealed from by the owner, was within the words of the bond.

Heagney v. Hopkins, 22 Misc. Rep. 549, reversed.

APPEAL from a judgment of the General Term of the City Court of the city of New York modifying, and as so modified, affirming a judgment in favor of the respondents dismissing the complaint.

Stanley W. Dexter, for appellant.

J. Woolsey Shepard, for respondents.

BEEKMAN, P. J. It appears from the record that one William Engel, the owner of certain property, entered into a contract with the defendants Hopkins and Roberts, under which the latter agreed to do certain work towards the erection of a building upon said premises, and they in turn contracted with the plaintiff in this action to do the plumbing and gasfitting work. Liens were subsequently filed by Hopkins and Roberts and by the plaintiff in this action respectively, and thereafter the former instituted an action for the foreclosure of their lien against Engel, making the plaintiff a party defendant. Such proceedings were thereupon had that after a trial of that action judgment was rendered against the owner, under which both of the liens were fully established, and the usual directions given for the sale of the property and the payment of such liens out of the proceeds. Before the commencement of such action the lien of the plaintiff herein was discharged, pursuant to the statute, upon the execution and delivery of a bond to the clerk of the city and county of New York by Hopkins and Roberts, as prin-

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cipals, and the defendants Adler and Donges, as sureties. The condition of the bond was that if "Le Roy Hopkins and John B. Roberts, their heirs, executors or administrators, shall well and truly pay any and all judgments which may be rendered against said property in favor of said Eugene F. Heagney, his legal representatives or assigns, in any action or proceeding to enforce his alleged lien, then this obligation shall be void, otherwise to remain in full force and virtue." The judgment was rendered on the 10th day of July, 1896, and on the 19th day of August of the same year an appeal was taken therefrom by the owner to the Appellate Division, and on the same day an undertaking was given by him in such form as to stay execution of the judgment so appealed from. Subsequently, and before the hearing and determination of such appeal, this action was brought upon the bond which had been given for the purpose of discharging plaintiff's lien upon the premises. The defendants have answered, setting up, among other things, the pendency of the appeal and the giving of the undertaking thereon. Upon the trial the court dismissed the complaint upon the merits. The General Term of the City Court modified the judgment, striking out the words "upon the merits," but as so modified affirmed it, apparently, as disclosed by their opinion, on the ground that the condition of the bond contemplated a final judgment against the property, and that as the judgment in the foreclosure proceedings had been appealed from, which appeal was still pending, the judgment was not final and the plaintiff's action had been prematurely brought. The counsel for the defendants urges the further point that no action can be separately maintained upon such a bond, but that the sureties should have been made parties to the foreclosure action, and he cites in support of his claim the case of Morton v. Tucker, 145 N. Y. 244. It is, however, unnecessary to enter upon any discussion of the question in view of the fact that the Appellate Division in this department in the case of Ringle v. Matthiessen, 10 App. Div. 274, has held otherwise. By that decision we are bound, and the question is, therefore, no longer an open one here.

We are thus left to consider only two questions which the record presents for discussion: (1.) Whether the undertaking on appeal in the foreclosure proceedings operated as a stay of any proceedings for the enforcement of the bond; (2) the construction to be given to the condition of the bond. At the outset it is necessary to call attention to the fact that the bond in this case was not given by the owner, Engel, but by the principal contractor. This

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is no longer permissible under the provisions of the Lien Law as it now stands (chap. 418, Laws of 1897, § 18), but at the time the bond in question was given and the lien discharged the statute was broad enough to include the contractor, and a bond given by him as the moving party, seeking a discharge of the lien, was held to be within the purview of the statute. N. Y. Lumber & Woodworking Co. v. Seventy-third Street Building Co., 22 N. Y. St. Repr. 314. Where the bond is executed by the owner, he still continues chargeable, so to speak, with respect to the lien by the substitution of his personal engagement for the land, and the sureties who join in the execution of the bond are sureties for him and entitled to resort to him for reimbursement if they are compelled to pay upon a breach of the condition. There is, therefore, an obvious distinction between such a bond and one given by the contractor. In the latter case the contractor becomes the principal, and the sureties are sureties for him and bound only to the performance by him of the obligation which they have entered into. The importance of this distinction in its bearing upon the question under examination, will be apparent. Where the lien is discharged upon the owner's bond, he is necessarily interested in any attempt to enforce it; and where the method adopted is by first obtaining a judgment in foreclosure proceedings, establishing the lien against the property, and then prosecuting the bond, there is considerable force in the claim that the latter action is one brought to secure the fruits of the foreclosure judgment, and, therefore, subject to the stay of execution affecting that judgment. That judgment, while against the property, in one sense, is so only as a matter of form; that is, while it determines that the lien was a valid and enforcible one, it stops there and declines to enforce it because of its discharge. It simply establishes a right without providing means for its enforcement. Where, then, the owner has appealed from the judgment of foreclosure and has obtained a stay of proceedings pending the appeal in the manner provided by law, the argument is certainly a very persuasive one that, during its continuance, it operates to prevent any action upon the bond given by the owner upon a discharge of the lien. It has been held that such a stay is effectual against any proceeding "to enforce the plaintiff's rights under the original judgment, or to obtain the fruits of it." Morey v. Tracey, 92 N. Y. 581.

While suggesting the force of this contention, we do not propose to pass upon it in view of the fact that in the case before us the lien was discharged and the bond given not by the owner but by the con-

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tractor. The suit which has been brought upon the bond is against the contractor and his sureties, and not against the owner, to whom it is a matter of indifference whether there is a recovery upon it or not. The stay which he has obtained is for his own benefit, intended as a protection to him against proceedings to his hurt under or on the footing of the judgment while the appeal is pending; and as this action is not for the enforcement of the original judgment or to secure the fruits of it *as against him* it cannot be properly claimed that it comes within the operation of the stay. There are certain features of the case which at this point it is proper to refer to. The validity of the lien of the plaintiff is dependent upon the determination of the question whether the owner owed the defendants, Hopkins and Roberts, the principal contractors anything; otherwise it was not the subject of dispute. The controversy was entirely with respect to the indebtedness of the owner to Hopkins and Roberts and the validity of their lien, which had not been bonded and discharged. The judgment passed in their favor, and provided for a sale of the property to satisfy the amount of their claim, so that there was a sufficient reason in this fact alone for the securing by the owner of a stay of proceedings pending his appeal. While it is true that the judgment apparently makes provision for the payment of the plaintiff's claim out of the proceeds of the sale, it is none the less to be treated as in that respect merely formal. Certainly the plaintiff, having brought his action on the bond, the consideration of which was the discharge of the lien, could not be allowed to take any other position. It is thus apparent that the only person who might be in a position to claim the application of the stay to this action is not a party to it nor apparently interested in its event. The contractors who in this action are seeking the benefit of the stay are those against whom it is leveled, who are themselves subject to its restraining force, and who are the respondents on the appeal, there contending that the judgment is irreversible for error and should stand, while the sureties are strangers to the owner and bound not for the payment by him, but by the contractors of any judgment rendered against the property in favor of the plaintiff. Under the peculiar facts of this case we conclude, therefore, that the existence of the stay in question is not available as a defense in this action.

The contention that there has been no breach of the condition of the bond, because, by reason of the appeal, the judgment lacks the attribute of finality, and that this action has, therefore, been

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prematurely brought, is also untenable. It will be observed that the condition is very broad in its terms, binding the parties to the payment of "any and all judgments which may be rendered against the property" in favor of the plaintiff. Of course, this imports that the judgment so rendered must be final as distinguished from an interlocutory judgment, but there is no claim made here, nor could there be any that the judgment in question is not final in that sense. It is a complete determination of the rights of the parties to the suit with respect to its subject-matter, leaving no further question or direction for future determination, except such as may be necessary to carry it into effect. 12 Am. & Eng. Enc. of Law, p. 63; Morris v. Morange, 38 N. Y. 172. In the latter case the court held that a judgment of foreclosure of a mortgage was a final judgment, and as the action to foreclose a mechanic's lien is by statute assimilated to one for the foreclosure of a mortgage, the case is an authority here. It is true that the words "final judgment" are often used to designate a judgment which is irreversible on appeal, or one from which no appeal will lie, and where the case is one in which it is apparent that the words were used in that sense, effect must be given to them accordingly. But there is nothing in the case before us to justify such an extreme construction. The language here used is "any and all judgments which may be rendered against the property," and the judgment in question responds clearly and naturally to that description. The word "final" is not used, and there is not, therefore, the possible suggestion which might then have arisen that as the judgment of foreclosure would have been final in the legal acceptation of the term without such a characterization, the employment of the word tended to show that the parties had in contemplation something more, namely, a judgment final in the sense that it was to be beyond the reach of reversal. We do not think that the terms of the bond call for any such construction. So to hold would be to impose a special and limited meaning upon the language used narrower than its ordinary and natural import, which, if intended, could have been aptly expressed in appropriate terms. It would also result in difficulties and embarrassments in the enforcement of such obligations which would be quite opposed to the spirit of the Mechanics' Lien Law, the object of which is to secure a certain and speedy method of satisfying the demands for which such liens are given, and which is required to be liberally construed to that end. The mere pendency of an appeal does not affect the validity or effect of the judgment pending the

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appeal. Storrs v. Plumb, 30 Hun, 319, 320. An action may still be maintained upon such a judgment, provided its enforcement has not been actually stayed while the appeal is pending (Faber v. Hovey, 117 Mass. 107; Clark v. Child, 136 Mass. 344; Taylor v. Shew, 39 Cal. 536; Merchants' Ins. Co. v. De Wolf, 33 Penn. St. 45; Suydam v. Hoyt, 1 Dutch. [N. J.] 230); and notwithstanding it is appealed from, it may still be pleaded as a bar while it remains unreversed. Harris v. Hammond, 18 How. Pr. 123, Sup. Ct., Gen. Term.

It is plain, therefore, that a judgment does not lose its character or abate in any of its essential attributes, because it has been appealed from, so long as it is unreversed; so that, in the case at bar, the mere fact that an appeal had been taken did not diminish or suspend the obligation which the defendants entered into to pay the judgment which had been rendered in plaintiff's favor. In other words, it was no defense to the action. It is urged that this involves great hardship, and would result in a denial of justice should the judgment be ultimately reversed after a recovery has been had in this action. Such is at times the effect of the application of legal principles under the constraint of formal methods adopted for the orderly administration of justice. But it may be said that the court is not entirely without power to deal with such a situation. It was held by the Court of King's Bench (Cristie v. Richardson, 3 Term Rep. 78), that the court would stay the proceedings in an action on a judgment pending a writ of error brought to reverse that judgment; and in Suydam v. Hoyt, 1 Dutch. (N. J.), 230, it is said that the granting of such a stay is in the discretion of the court in which the action is brought. While in the present case the action, strictly speaking, is not upon the judgment, the reason for the rule would seem to justify its extension to such a case as this. The defendants, however, have not sought such relief, but rest upon the matters alleged as a legal defense to the action. As they do not constitute such a defense, it follows that the court erred in dismissing the complaint, and the judgment must, therefore, be reversed.

Judgment reversed and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and a new trial ordered, with costs to appellant to abide the event.

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BLANCHE A. BURNELL, Appellant, *v.* WILLIAM F. COLES, Respondent.

(Supreme Court, Appellate Term, June, 1898.)

1. **Open commission — Review by Appellate Term.**

Where the requirements of the Code of Civil Procedure have been met, the Appellate Term will not review an order granting an open commission, as such an order involves the exercise of discretion upon the part of the court below.

2. **Same — Affidavit.**

Where the defendant's papers, on his application for an open commission in an action for a breach of promise of marriage, do not show that his proposed witnesses are not within the state of New York at the time when the application is made, nor explicitly allege that the witnesses are material and necessary, where the name of no witness sought to be examined is given, or any fact or circumstance set out which it is claimed will prove or tend to prove the alleged defense, an order for an open commission must be reversed.

Burnell v. Coles, 23 Misc. Rep. 260, reversed.

APPEAL by plaintiff from an order of the General Term of the City Court, affirming an order of the Special Term.

P. S. Jones (Henry J. McCormick, of counsel), for appellant.

Moore, Bleecker & Wheeler, for respondent.

GILDERSLEEVE, J. The Special Term of the City Court, on motion of the defendant, granted an order directing that an open commission issue to take the examination in Boston, Mass., of witnesses, to be named in the commission, who might be produced before the commissioner designated in the order. The order also provides that the plaintiff may call and examine under the commission any witnesses she may be advised. This order was affirmed by the General Term of the City Court, and the order of affirmance is now before us for review. The application for the order is made under section 894 of the Code, which provides that "where an issue of fact, joined in an action, is pending in either of the courts specified in the last section (of which the City Court is one), the parties may

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stipulate, in writing, or the court, or a judge thereof, * * * may, in its or his discretion, upon the application of either party, and upon satisfactory proof, by affidavit, that one or more witnesses, not within the state, are material and necessary in the prosecution or defense of the action, make an order, upon such terms as it or he deems proper, directing that an open commission issue, or that depositions be taken, as prescribed in the following sections of this article." The appellant challenges the order, and asserts, as ground for reversal, that the moving affidavits are entirely insufficient to justify the granting of an open commission. The granting or refusing of an order for an open commission to examine witnesses is not reviewable here, provided the application therefor has met the requirements of the Code, and the court below has not exceeded its authority. It is not our province to review an order of the City Court involving the exercise of discretion by that court. Lawrence v. Samuels, 20 Misc. Rep. 279; Kreizer v. Allaire, 16 id. 6; Howell v. Mills, 53 N. Y. 322; Livermore v. Bainbridge, 56 id. 72. It is our duty, however, to examine the papers upon which the application for the commission is based, for the purpose of seeing whether a legal foundation has been laid for the order. If the affidavits are found to be insufficient to bring the case within the law authorizing the application, no question was presented to the court below calling for the exercise of discretion.

The action is brought to recover damages for the alleged breach of a promise of marriage. One defense is that the plaintiff was of bad and immoral character, and, unknown to defendant, has been guilty of licentious and improper conduct. The defendant presents his own affidavit and the affidavit of one of his attorneys. From these affidavits it appears that until a short time before the commencement of the action, the plaintiff had been a resident of the city of Boston, in the Commonwealth of Massachusetts, and that the persons, by whom defendant expects to prove the bad and immoral character and licentious and improper conduct of plaintiff, resides in and about that city. It is also stated in defendant's affidavit that "some of the witnesses by whom deponent expects to prove the above-mentioned facts have expressed their willingness to testify, but many others have declared themselves unwilling so to do; that deponent knows the names of many of the witnesses material to his said defense, and the reason why he does not give them now is that many of them are hostile and would evade giving testimony, if their names were disclosed at present, and many who are now will-

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ing to give testimony would become unwilling; * * * that a commission authorizing the taking of depositions or the answering of interrogatories to be here settled will not meet the requirements of this case, nor can the defendant thereby obtain from the several material witnesses aforesaid a full and impartial statement of the facts within their knowledge." The defendant then goes on to state that he has been unable to find any person residing in this state who has sufficient knowledge of the alleged facts that he expects to prove by the witnesses residing in and about the city of Boston, and adds, "that there are no persons now residing within this state, to the knowledge of deponent, by whom such facts can be proved." The only addition to the foregoing averments, that is presented by the affidavit of the attorney, is the following: "Deponent further says that he has seen several of these witnesses, and that the testimony they could give would be necessary to the defendant and competent to his defense." It will be observed that the affidavits fail to meet the requirements of the statute, in that it is nowhere averred that the witnesses, sought to be examined, "are not within the state." An averment that the witnesses do not reside within the state is held to be insufficient to justify the issuance of any commission. The proof must be that the witnesses are not within the state at the time that the application for the commission is made, which is a very different thing from a mere statement of nonresidence. Wallace v. Blake, 16 Civ. Pro. 384; Apollinaris Co. v. Venable, 10 N. Y. Supp. 469. It must also be said that it is not explicitly averred, nor can it be reasonably implied, that the alleged witnesses in and about Boston are material and necessary in the defense of the action. The nearest approach to supplying that requisite of the statute is found in the above-quoted portion of the attorney's affidavit, which says, "that the testimony they could give would be necessary to the defendant and competent to his defense. We do not think that this averment is proof that the witnesses are material and necessary in the defense of the action. Abbott-Downing Co. v. Faber, 87 Hun, 299; Clark v. Sullivan, 28 N. Y. St. Repr. 596. Not a single name of any witness, proposed to be examined, is given, and no fact or circumstance is set out which it is claimed, will prove or tend to prove the alleged defense. Darling v. Klock, 74 Hun, 248. Moreover, it affirmatively appears from the affidavits that some of the witnesses have expressed their willingness to testify. The testimony of these witnesses may be sufficient to establish the defense. It certainly is not unreasonable to require that

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the willing witnesses should be first examined by the ordinary method, before an open commission is granted. The power conferred by section 894 of the Code should not be exercised, except in cases in which it clearly appears to be necessary for the purposes of justice that there should be an open commission. Heney v. Mead, 4 L. B. 10; Lentilhon v. Bacon, 48 N. Y. St. Repr. 864; Kaempfer v. Gorman, 43 id. 800. An open commission will not be ordered, unless it satisfactorily appears that an ordinary commission will not accomplish the purpose sought. Dickinson v. Bush, 17 Week. Dig. 17; Kaempfer v. Gorman, 22 Civ. Pro. 35. Following the language of Mr. Justice Ingraham, in Einstein v. General Electric Co., 9 App. Div. 570, we may very properly say that what the defendant wants to do is to get an order under which he can subpoena such persons as he pleases, who reside in and about the city of Boston, examine them to ascertain whether or not they will testify to any facts which he thinks will support his defense, and by somewhat of a fishing examination, involving great expense to plaintiff, see if the facts exist which would aid his defense. It is not the true purpose of a commission to accomplish such an object.

We think the affidavits were insufficient to warrant the granting of the order, and that the error of the court below, in granting the same, was an error of law which we are called upon to correct.

The orders should be reversed and the motion denied, with costs, with leave to renew motion on proper papers.

Beekman, P. J., and Giegerich, J., concur.

Order reversed, motion denied, with costs, with leave to renew motion.

Frederick G. Hobbs et al., Respondents, *v.* George Edgar et al., Appellants.

(Supreme Court, Appellate Term, June, 1898.)

Real estate brokers — Commissions.

Where the communications of a real estate broker with a purchaser are the means of bringing him and the owner together and a sale results in consequence, the broker is entitled to commissions, nor can he be deprived of them by the action of the owner in subsequently taking the matter into his own hands, without terminating the agency, and selling the property to the same purchaser at a reduced price.

Hobbs v. Edgar, 22 Misc. Rep. 510, affirmed.

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APPEAL from a judgment of the General Term of the City Court, affirming a judgment of the Trial Term, entered on the verdict of a jury, in favor of the plaintiffs.

Philbin & Beekman, for appellants.

Leventritt & Nathan, for respondents.

GILDERSLEEVE, J. The action is brought to recover brokers' commissions for the sale to one Flint of real property, No. 42 West Sixty-ninth street, in this city, belonging to the defendants. There is no question of the employment by the defendants of plaintiffs to effect the sale. Plaintiffs claim that they were the procuring cause of the sale, which is denied by defendants. As the Appellate Term cannot weigh the evidence, if conflicting, on appeals from the City Court, the judgment must be affirmed, if there is any evidence to sustain plaintiffs' contention; provided there are no errors of law, to which exceptions have been taken, in the rulings as to the admission of evidence, or in the charge or refusals to charge, of sufficient importance to warrant a reversal.

It seems to us that the evidence of Birch, together with certain admissions on the part of Flint, and some uncontradicted statements on the part of the defendant Edgar himself, establishes a state of facts tending to show that the plaintiffs were brokers employed to sell the property at a given price, *i. e.*, $58,000; that they opened a negotiation with the purchaser, Flint; and that the defendants, without terminating the agency or the negotiation so commenced, took it into their own hands and concluded a sale for a less sum than the price fixed, *i. e.*, $52,500. Under this state of facts, the plaintiffs were entitled to their commissions of 1 per cent. on the purchase price. See Martin v. Silliman, 53 N. Y. 615. The evidence is sharply conflicting upon many material questions of fact, but we must accept the plaintiffs' version as the correct one, since we cannot review the weight of evidence or the credibility of the witnesses. The defendants and Flint swear that the negotiations were conducted through another broker, named Phillips; but what, if any, efforts he made, to bring about a meeting of minds, do not appear. Flint admits that he first visited the house with Birch, one of the plaintiffs, and that Birch was the first broker who spoke to him in reference thereto. It is not claimed by plaintiffs that they were present at the sale; but this fact is of no consequence, for to entitle a real estate broker to compensation, it is

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sufficient that a sale is effected *through his agency, as its procuring cause;* and if his communications with the purchaser are the means of bringing him and the owner together, and the *sale results in consequence*, the compensation is earned, although the broker does not negotiate and is not present at the sale. See Lloyd v. Matthews, 51 N. Y. 124. Where two brokers are employed, the one effects the sale who brings the minds of the parties to meet (see Smith v. McGovern, 65 N. Y. 575); but, as we have said, there is no evidence as to the efforts of Phillips in the matter, while plaintiffs' testimony shows that Birch brought the parties together, and opened the negotiations between them, which continued without the withdrawal of either party therefrom, and which culminated in a sale. It is true that the purchase price was less than the sum first fixed by the defendants, but it is not essential, to entitle a real estate broker to commissions, that he should have procured a purchaser upon the precise terms first named by the principal at the time of employment; for if, through the instrumentality of the broker, the buyer and seller meet and negotiations are thus opened up between them, which, continuing without withdrawal of either party therefrom, culminate in a sale, though for a less sum than originally demanded, the broker is entitled to his commissions. See Levy v. Coogan, 16 Daly, 137.

We find no exceptions to the rulings of the trial justice, or to his refusal to charge, of sufficient importance to require discussion; while to the charge itself no exception was taken. We are of opinion that the judgment, so far as assailed on this appeal, should be affirmed, with costs.

GIEGERICH, J., concurs; BEEKMAN, P. J., not voting.

Judgment affirmed, with costs.

THE SIDNEY B. BOWMAN CYCLE CO., Respondent, *v.* ELISHA DYER et al., Appellants.

(Supreme Court, Appellate Term, June, 1898.)

Bill of particulars — Review by Appellate Term — Affidavit.

The Appellate Term will not ordinarily review an order of the City Court of New York, for a bill of particulars but where, upon a plaintiff corporation's application for such a bill relative to a counterclaim, in order that it may prepare a reply, the affidavit made by its presi-

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dent and general manager states that "he" has no knowledge or information of the items of damage alleged in the counterclaim, there is a failure to prove that the corporation cannot, through any of its officers or servants, acquire the desired information.

An affidavit in which the president, although alleging that he is advised by his counsel of the necessity of being apprised of certain items by a bill of particulars in order properly to prepare a reply to the counterclaim, does not allege that he has fully and fairly stated the case to his counsel and does not give the name and residence of his counsel, fails to comply with the provisions of Rule 23 of the General Rules of Practice.

APPEAL from an order of the General Term of the City Court affirming an order of the Special Term, granting plaintiff's motion for a bill of particulars of the matters set forth in the counterclaim contained in the answer.

Dos Passos & Mitchell, for appellants.

Greene & Johnson, for respondent.

GILDERSLEEVE, J. The defendants appeal from an order of the General Term of the City Court, affirming an order of the Special Term granting plaintiff's motion for certain particulars of a counterclaim interposed by defendants. Issue had not been joined at the time of the motion; and the relief sought could, therefore, only be granted on the ground that the particulars were necessary, in order to enable the plaintiff-corporation to frame its reply. American Credit & Ind. Co. v. Bondy, 17 App. Div. 328. Recognizing the rule that a bill of particulars, granted by the City Court, is not reviewable by the Appellate Term, unless it clearly transcends the power of the court, as defined by the general course of practice in respect to bills of particulars (see Witkowski v. Paramore, 93 N. Y. 467; Lawrence v. Samuels, 20 Misc. Rep. 279; Kreizer v. Allaire, 16 id. 6; Howell v. Mills, 53 N. Y. 322; Livermore v. Bainbridge, 56 N. Y. 72; Cohn v. Baldwin, 141 N. Y. 563), we must examine the affidavit to ascertain whether it was sufficient to confer jurisdiction upon the court to order a bill of particulars. Wales Mfg. Co. v. Lazzaro, 19 Misc. Rep. 477, 43 N. Y. Supp. 1110. The affidavit is made by Sidney B. Bowman, the president and general manager of the plain-

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tiff-corporation, and states that "*he* has knowledge or information sufficient to form a belief as to the items of damage and loss of revenue and expenses, alleged to have been incurred by the said club." The counterclaim is not interposed against the president and general manager personally, but against the plaintiff-corporation. The absence of knowledge or information on the part of Mr. Bowman, who is one of plaintiff's officers, does not imply that some other officer or agent of the corporation may not be fully cognizant of all the matters that are alleged as the basis of defendants' counterclaim. The affidavit should go further and state that the plaintiff cannot through any of its officers, agents and servants acquire the information. It should appear from the affidavit that the means of obtaining the information required are beyond the reach of the plaintiff. Wales Mfg. Co. v. Lazzaro, *supra;* Constable v. Hardenbergh, 76 Hun, 438.

While Mr. Bowman avers that he is advised by his counsel of the necessity of being apprised of certain items by a bill of particulars, in order to properly prepare a reply to the counterclaim, he does not swear that he has fully and fairly stated the case to his counsel, nor does he give the name and residence of such counsel. It must, therefore, be observed that the affidavit fails to comply with the provisions of rule 23 of the General Rules of Practice, which is to the effect that "whenever it shall be necessary in any affidavit to swear to the advice of counsel, the party shall * * * swear that he has fully and fairly stated the case to his counsel, and shall give the name and residence of such counsel."

We think the moving affidavit is fatally defective and insufficient to authorize the order for a bill of particulars. The order should be reversed and the motion denied, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Order reversed and motion denied, with costs.

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JAMES REGAN, Appellant, *v.* WILLIAM FOSDICK, Respondent.

(Supreme Court, Appellate Term, June, 1898.)

Action for double rent — Recovery for single rent refused.

Where a landlord is defeated in an action to recover double rent of a tenant who held over the term after having given notice to quit (1 R. S. m. p. 745, § 10), the landlord is not, under such complaint, entitled to recover single rent for the term during which the tenant held over.

APPEAL from a judgment of the General Term of the City Court, affirming a judgment of the Trial Term dismissing the complaint.

W. H. Knox, for appellant.

A. E. Walradt, for respondent.

GILDERSLEEVE, J. On November 1, 1895, defendant leased from plaintiff a dwelling-house, No. 65 East One Hundred and Twenty-fourth street, in this city, for six months, ending May 1, 1896, at the monthly rent of $75, payable in advance. Defendant went into possession, and, on March 15, 1896, gave notice of his intention to quit on May 1, 1896, to plaintiff. Thereafter, and about April 12, 1896, defendant's child was taken sick in said house with scarlet fever, and continued to be sick with this disease until May 18, 1896. The case was reported to the bureau of contagious diseases of the board of health, and one of the inspectors took charge of it, and issued an order to defendant that he should not leave the premises "until the child was through desquamating," and he had ordered the premises to be fumigated. The house was fumigated on May 18th, and defendant left the premises on the 19th of May, 1896, having thus held over eighteen days. Plaintiff brought the action for double rent for the month of May, 1896, under the provisions of the statute. 2 R. S. (9th ed.) 1819, § 10.

On the first trial, judgment was given for plaintiff, which judgment was affirmed by the General Term of the City Court, but was reversed by the Appellate Term. See Regan v. Fosdick, 19 Misc.

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Rep. 489. A new trial was had, and judgment was given for the defendant, dismissing the complaint. This judgment was affirmed by the General Term of the City Court, and an appeal taken therefrom to this court.

The statute, under which plaintiff brings his suit for double rent, is as follows, viz.: "If any tenant shall give notice of his intention to quit the premises by him holden, and shall not accordingly deliver up the possession thereof, at the time in such notice specified, such tenant * * * shall, from thenceforward pay to the landlord * * * double the rent which he should otherwise have paid, to be levied, sued for and recovered at the same time and in the same manner as the single rent; and such double rent shall be continued to be paid during all the time such tenant shall continue in possession as aforesaid." On this point, the Appellate Term held that the statute only applies to a tenancy where the term is indefinite, and the tenant has the right, and seeks by notice, to terminate it; and the court, McAdam, J., goes on to say, "Where the term is definitely fixed the tenancy expires *ex vi termini*, and the giving of notice to quit is a work of supererogation, which furnishes no rights and creates no liabilities. It is clear therefore, that the defendant is in no event liable for double rent under the statute." As to the holding over, the Appellate Term held that a renewal of a lease by reason of the holding over of a tenant will not be implied where the tenant was prevented from removing by the action of the board of health in quarantining the family and forbidding such removal, and that the tenant in such case is liable, if at all, only for the use and occupation of the premises for the time he actually occupied them.

The only question, therefore, for us to consider is whether or not the defendant is liable for single rent of the eighteen days' occupation of the premises, *i. e.* from May 1, 1896, to May 19, 1896; for if plaintiff alleged a cause of action for such rent, the trial court erred in dismissing the complaint. We are of opinion, however, that, under the pleading set forth in the complaint, plaintiff is not entitled to maintain an action or recover a judgment for use and occupation.

There has been no amendment of the complaint. The complaint set forth the lease; alleges receipt of notice from defendant of his intention to quit the premises on May 1, 1896; alleges defendant's continuance in possession; the nonpayment of rent; and concludes by demanding judgment for $150, as double rent. We

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see, therefore, from a scrutiny of the complaint, and from an examination of the statute, that the cause of action alleged in the complaint is solely a cause of action for double rent, provided for by the statute. The Appellate Term, as we have seen, has already held that defendant is in no event liable for double rent under the statute. The court further say, "The rule undoubtedly is that, where a tenant holds over and continues in possession after the expiration of his term, the landlord ordinarily has an election of remedies. He may treat the tenant as a trespasser, by instituting proceedings to eject him; or he may hold him as tenant, on the terms of the original demise. The landlord, not having chosen the former remedy, ought to have declared on the new agreement created by the tenant's conduct and the landlord's election, or alleged facts, leaving such new tenancy to be implied, in which case the rent, if any, recoverable would be $75, the monthly rent reserved in the original lease. The landlord adopted neither of these courses."

It is a fundamental rule that the judgment must be *secundum allegata et probata* (see Romeyn v. Sickles, 108 N. Y. 652; Day v. Town of New Lots, 107 id. 148; Southwick v. Bank, 84 id. 420); and if the plaintiff recover at all, he must recover under the statute, to which, as we have already seen, he is not entitled. It, therefore, follows that the complaint was properly dismissed.

The judgment must be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

THE KNICKERBOCKER ICE COMPANY, Respondent, *v.* JOHN HENRY THEISS, Impleaded, etc., Appellant.

(Supreme Court, Appellate Term, June, 1898.)

Action on a joint contract — Recovery against one defendant.

The common-law rule, that the plaintiff must fail in an action upon an alleged joint contract unless he establishes the joint liability of all the defendants, is not the rule in the state of New York since the enactment of section 274 of the Code of Procedure and section 1204 of the Code of Civil Procedure.

Knickerbocker Ice Co. v. Theiss, 22 Misc. Rep. 767, reversed.

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APPEAL by the defendant John Henry Theiss, from a judgment of the General Term of the City Court of New York, affirming a judgment entered in favor of the plaintiff against the defendants, upon the verdict of a jury.

The nature of the action and the material facts are stated in the opinion.

Fromme Brothers, for appellant.

Charles K. Carpenter, for respondent.

GIEGERICH, J. The complaint sets forth three causes of action, each of which is predicated upon an allegation that the defendants were, during the times therein mentioned, copartners doing business under the firm name of "G. Theiss & Brother." The first two causes of action are based on promissory notes for $211.87, and $445.51, respectively, signed "G. Theiss & Brother," and the third for goods sold and delivered, to the amount of $33.

The defendants answered separately, but the answers are similar in all respects, each substantially denying all material allegations of the complaint. Upon the trial, however, the appellant alone appeared and defended the action.

The dealings of the plaintiff with the said firm were had under an agreement bearing date the 23d day of December, 1892, whereby the former agreed to deliver ice to the latter for five years from February 10th, 1893. The notes in suit were given for ice delivered in pursuance of such agreement, and were signed by the defendant George Theiss, in the firm name. It was conceded by the appellant upon the trial that he and his codefendant were copartners under the said firm name from 1891 to January 1, 1896. He testified, however, that on the last-mentioned date the firm was dissolved, by the sale of his interest therein to his wife, who has since conducted or managed the business and that after the dissolution he had nothing whatever to do with its management.

The testimony adduced on behalf of the plaintiff was to the effect that the dealings of the defendants with the former after January, 1896, were continued under the same firm name; that the notes which constituted the larger portion of the plaintiff's claim were signed in August, 1896, by the defendant George Theiss, in the name of G. Theiss & Brother; that demands for payment of these notes and of the open account were made at various times

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in 1896, and in January, 1897, from the appellant, and that the latter made admissions of his liability as a copartner during the period mentioned. Such declarations were competent evidence to establish the appellant's liability as a copartner during the times in question, and hence the exception noted to the admission thereof is without merit. Rogers v. Murray, 110 N. Y. 658.

After the close of the evidence and immediately before charging the jury, the learned trial justice said: "The court's view in this case is, that there must be a recovery against both or neither of these defendants, because the case is founded upon an allegation of copartnership, and I do not think on the proof now that there can be an individual recovery, so that I shall send the case to the jury on either a recovery against both or neither.

"Plaintiff's attorney: I except to that position on the ground that George Theiss having been made a defendant and admitting the debt, we ought at least to have a recovery against him.

"The Court: He has joined issue here by putting in an answer denying partnership, and the question to be determined is, whether there was a copartnership liability or not. Of course when I am through you may except to any part of my charge. I only intimate to you on what theory I intend to submit the case to the jury."

The justice, in his charge told the jury that, "to succeed in this case the plaintiff must show that this debt which it is suing upon is a copartnership liability, and that that copartnership existed between George Theiss and John Henry Theiss."

The appellant excepted to that portion of the charge that the jury was to bring in a verdict for both defendants or for the plaintiff. This brings up for review the correctness of such instruction.

Section 1204 of the Code of Civil Procedure provides: "Judgment may be given for or against one or more plaintiffs, and for or against one or more defendants. It may determine the ultimate rights of the parties on the same side, as between themselves; and it may grant, to a defendant, any affirmative relief, to which he is entitled."

This is a re-enactment of the first and second subdivisions of section 274 of the Code of Procedure.

It is well settled by numerous adjudications under the foregoing provisions that the common-law rule that in an action against several defendants upon an alleged joint contract, the plaintiff must fail unless he establishes the joint liability of all the defendants, is no longer the rule of procedure in this state. Parker v. Jackson,

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16 Barb. 33; Harrington v. Higham, 15 id. 525; Brumskill v. James, 11 N. Y. 294; Bacon v. Comstock, 11 How. Pr. 197; Claflin v. Butterly, 5 Duer. 327; 2 Abb. Pr. 446; Zink v. Attenburg, 18 How. Pr. 108; McKensie v. Farrell, 4 Bosw. 193; Pruyn v. Black, 21 N. Y. 300; McIntosh v. Ensign, 28 id. 169; Fielden v. Lahens, 2 Abb. Ct. App. Dec. 111; Stimson v. Van Pelt, 66 Barb. 151; McGuire v. Johnson, 2 Lans. 305; Clegg v. Cramer, 32 Hun, 162; Barth v. Amberg, 9 N. Y. St. Repr. 522; Stedeker v. Bernard, 102 N. Y. 327; Strauss v. Trotter, 6 Misc. Rep. 79.

The case of Hand v. Rogers, 16 Misc. Rep. 17, cited by the respondent, has no application for the reason that there the contesting defendant executed the contract in a certain firm name, but it did not appear that there was no such firm, of which the defendant was alleged to be a member, or that the contract was for his individual benefit. Here, however, the situation is entirely different. The defaulting defendant and not the appellant executed the notes in question, and the testimony of the latter would have supported a finding by the jury that the alleged transactions were had after the firm had ceased to exist, or that they were for the sole benefit of the said defendant George Theiss.

In the light of the foregoing authorities it is manifest that the instruction that the jury must find a verdict either against or in favor of both defendants was erroneous; for under it the jury were prohibited from rendering a separate verdict for or against either of the defendants, even though they may have arrived at the conclusion that the defendant George Theiss signed the notes in the firm name after its dissolution, and that the appellant had severed his connection with the firm before the transactions adverted to took place.

These considerations may have influenced the jury when deliberating upon the questions of fact submitted for their determination, and especially in determining the liability of the defendants upon the claim of the plaintiff, and sought to be enforced by this action, and as we do not know but that their verdict was rendered upon the strength of this instruction the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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JAMES S. WRIGHT, Appellant, *v.* ISAAC W. PARMENTER, Respondent.

(Supreme Court, Appellate Term, June, 1898.)

Statute of Limitations — Acknowledgment of debt.

A letter written to a creditor by a debtor in which he says, "I regret to say that my neglect in not responding to your statement of account was owing to my not having disposed of but few of your goods (and those as samples) as it was nearly two years before I placed the first plant, but now that I have got the ball rolling, am in hopes to do good business in the future, that is, if Inman who is now over there, don't reap the benefit of the trade that took me three years to establish," when preceded by a statement of account mailed by the creditor to the debtor, constitutes an acknowledgment of the debt sufficient to remove from it the bar of the Statute of Limitations.

APPEAL from a judgment rendered in the Municipal Court of the City of New York, borough of Manhattan, sixth district, in favor of the defendant.

Sproull, Harmer & Sproull, for appellant.

Benjamin N. Cardozo, for respondent.

BEEKMAN, P. J. On the 7th day of May, 1891, the plaintiff's assignor sold and delivered certain goods to the defendant, for which the latter agreed to pay the sum of $155.50. At the same time a statement of the account was mailed to the defendant, showing an indebtedness for the above amount. No part of the sum having been paid, this action was brought to recover the debt. The defense is the Statute of Limitations, and unless the plaintiff is able to show an acknowledgment of the debt in writing within six years prior to the commencement of the action, the plea must be sustained.

It appears that on the 11th day of April, 1894, the defendant wrote a letter to the plaintiff's assignor, in which, among other things having no bearing upon the subject-matter of this action, he said: "I regret to say that my neglect in not responding to your statement of account was owing to my not having disposed of but few of your goods (and those as samples) as it was nearly two years

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before I placed the first plant, but now that I have got the ball rolling, am in hopes to do good business in the future, that is, if Inman, who is now over there, don't reap the benefit of the trade that took me three years to establish."

The justice below held that this was not a sufficient acknowledgment of the debt to take the case out of the operation of the statute, and accordingly dismissed the complaint.

To undertake to review the cases in which the court has passed upon the sufficiency of such acknowledgments would extend this opinion beyond permissible limits. The question is usually a close one, being rather one of fact than of law, determinable upon a construction of the writing relied upon. Cudd v. Jones, 63 Hun, 142; Anderson v. Sibley, 28 id. 18; De Freest v. Warner, 30 id. 94; Shapely v. Abbott, 42 N. Y. 443; Kincaid v. Archibald, 73 id. 189; Shaw v. Lambert, 14 App. Div. 265; Henry v. Root, 33 N. Y. 526; Woods v. Supervisors, 136 id. 403.

We may gather from the cases, however, certain general principles which are useful in guiding the mind to a correct conclusion. In the first place, the writing claimed to be an acknowledgment of the debt should be liberally construed. The law does not favor such a plea. It recognizes at all times the existence of a moral obligation to pay the debt, and treats the Statute of Limitations as simply suspending the remedy. It has never been regarded as necessary that the writing should be a formal acknowledgment of the continued existence of the debt. Whatever be the language used, if it is susceptible of a construction which fairly discloses an intention to recognize the claim, the acknowledgment is deemed sufficient within the statute, if not coupled with a refusal to pay or other conditions inconsistent with a purpose to do so; and where conditions are imposed, a compliance therewith may be shown. A promise to pay, however, in terms is not requisite. If the acknowledgment of the debt is sufficient and unconditional, a promise to pay it may be implied. If the writing contains either an acknowledgment or a promise, it is sufficient. Kincaid v. Archibald, 73 N. Y. 189, 193; Cudd v. Jones, 63 Hun, 142.

In the case of Shaw v. Lambert, 14 App. Div. 265, Ingraham, J., says: "There has been much discussion in the reported cases as to just what words will suffice to make an acknowledgment of, or promise to pay, an existing indebtedness sufficient to take a claim out of the statute; and learned judges have commented upon the little assistance that reported cases give in determining the effect of the

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particular language used. There must be, however, an acknowledgment of a debt or a promise to pay a debt; and in dealing with each particular case what has to be ascertained is the intention of the writer of the instrument, upon which is based the acknowledgment of the existing liability or the new promise to pay the debt. * * * The writing must show that it was the intention of the writer to either acknowledge the debt or promise to pay it." Nor is it necessary that the acknowledgment should be made after the statute has run. It is sufficient if made at any time within six years prior to the commencement of the action. Neither is it essential that the amount of the debt should be stated.

In Kincaid v. Archibald, *supra*, Andrews, J., says (p. 192): "What prior to the statute would have been a sufficient acknowledgment or promise, was after the statute sufficient, if reduced to writing, signed by the party to be charged; and in Lechmere v. Fletcher, 3 Tyr. 450, it was accordingly held that it was not necessary that the written promise or acknowledgment should state the amount of the debt, but that this could be shown by oral testimony."

A valuable review of authorities bearing upon the question under discussion will be found in the opinion of Judge Davies in the case of Henry v. Root, 33 N. Y. 526, at pages 529-535.

In considering the writing relied on in the case at bar, I am of the opinion that it fairly imports a recognition of an existing and continuing liability for the claim in suit. The proofs show and it is not disputed that there never had been more than one transaction between the plaintiff's assignor and the defendant. It also appears that a statement of account founded upon that transaction had been duly transmitted to the defendant, before the letter in question was written, which is in evidence and shows the items and price of the goods referred to in the complaint. We have thus a complete identification of the debt sued for with that referred to in defendant's letter. While the letter is apologetic in form, it is none the less for that reason a plain acknowledgment that the debt was a subsisting one. In admitting his neglect to respond to, that is to pay, the claim, coupled with a statement of his expectation of doing a good business in the future, the defendant as clearly acknowledged the existence of the debt as if he had so stated in as many words. Expressing that which was necessarily implied as well as that which was said, the statement of the defendant was that he had received the account sent to him by the plaintiff's assignor showing that he was indebted to him in the sum of $155.50; that

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it was still due and owing; that his neglect to pay it was the subject of regret on his part, and that the reason he had not paid it was connected with his inability to sell the goods he had purchased. The reference he then makes to his expectation of better business in the future was obviously intended to be persuasive of forbearance on the part of his creditor by holding out hopes of a settlement. If this construction is not correct, then the paper presents the ridiculous situation of a debtor apologizing to his creditor for not paying a debt the existence of which he does not acknowledge.

The books are full of cases where the language held to constitute a sufficient acknowledgment was not more forcible or direct than was used here. I find no difficulty, therefore, in concluding that the letter above referred to constituted a plain acknowledgment of a continuing indebtedness with respect to the subject-matter of this action, and that it was unconditional in its character. As it was made within six years prior to the commencement of this action the claim was, therefore, not barred by the Statute of Limitations, and the action of the court below in dismissing the complaint was error, for which the judgment must be reversed.

Judgment reversed and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GEIGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

IGNATZ LICHTIG, Respondent, *v.* SOPHIA E. POUNDT, Appellant.

(Supreme Court, Appellate Term, June, 1898.)

Landlord and tenant — Duty to repair — Negligence.

Where the roof of a rear one-story extension, forming a part of demised premises, has no other reason for its existence than to protect the extension, the landlord is not liable to the tenant for damages resulting to his goods, stored in the extension, from a flood which, in some unexplained manner, came through the skylight in the roof of the extension; and particularly where it appears that that roof had been constructed within seven or eight months and was not shown to have been defective.

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APPEAL from a judgment in favor of the plaintiff, rendered in the Municipal Court of the City of New York, borough of Manhattan, eighth district.

George W. McAdam, for appellant.

Benno Loewy, for respondent.

BEEKMAN, P. J. This action was brought to recover damages for an injury to property alleged to have been caused by the negligence of the defendant. The latter was the owner of the premises No. 482 Eighth avenue in the city of New York, and about the 1st day of October, 1896, leased a portion of the same, consisting of the basement and store floor, to the plaintiff. In the rear of the store, and forming a part of the demised premises, was a one-story extension, about twenty feet in depth. There was no other structure or story above this extension, which was covered over by a roof, in the center of which was a skylight. On the 10th day of June, 1897, a large amount of water, apparently coming from the roof of the extension, passed into the plaintiff's store, damaging certain goods of his which were situated in the extension. The complaint, which is in writing, avers that the injury was caused by the negligence of the defendant in permitting "the roof of said store and basement to become old, rotten and leaky, and insufficient to withstand rain, water and moisture which may descend upon it." The answer interposed was a general denial. The action having been tried, the justice below awarded judgment in favor of the plaintiff, and it is from this judgment that the appeal is taken.

It is contended by the defendant that the action cannot be maintained in view of the fact that the roof of the extension formed a part of the demised premises, and that even assuming that the landlord was under an obligation to repair the same, an action would not lie to recover damages such as are here complained of for a failure to perform such agreement. Schick v. Fleischhauer, 26 App. Div. 210. The counsel for the plaintiff, however, disputes the fact that said roof was covered by his lease, claiming that he had no control over it, nor access to it, and that the landlord had assumed the care of it. It is claimed that the case is similar to those in which the courts have held that the landlord is responsible to his tenants for defects in hallways and staircases occasioned by his negligence; but in all of those cases the landlord's liability was

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predicated upon the fact that such places did not form part of the demised premises, but continued under his control, with an associated duty, arising out of the purpose for which they were intended and used, to see that they were reasonably safe.

In the case at bar the roof of the extension existed for no other purpose whatsoever than as an inclosure of the extension. It formed a part of the extension and was essential to its existence and use for the purpose for which it was constructed, so that in leasing it the roof in question formed as much a part of the demised premises as the side and end walls which completed the inclosure — all equally contributing to the inclosure which gave existence to the subject-matter of the demise. I think, therefore, that the case comes within the rule laid down in Schick v. Fleischhauer, *supra*, and that the complaint should, therefore, have been dismissed.

But if I am mistaken in this, I am still of the opinion that the plaintiff was not entitled to judgment on the facts. There was no evidence whatsoever in the case showing that there was any defect in the roof which was the proximate cause of the injury complained of for which the defendant could be held responsible. It was not shown that there was any hole, crack or crevice in the roof, as alleged in the complaint, and what it was that caused the flood, as it was described, to enter the premises of the plaintiff was a matter of pure conjecture. There was some evidence in the case tending to show that the leader from the roof of the extension had become stopped up by reason of some foreign substances which had in some way got in it, and the theory of some of the witnesses with respect to the cause of the occurrence, about which they were allowed to speculate with great freedom, was that the water accumulating upon the roof could not pass off owing to the stoppage in the leader, and continuing to rise, at length reached the top of the skylight, and in that way entered the premises in question. But as I have said, this was purely a matter of speculation on their part. Assuming, however, that this was the cause of the injury, it does not appear that the landlord was in any way responsible for the stoppage of the leader, or that she had at any time notice that such was its condition. Furthermore, the plaintiff has not in his complaint assigned this as a ground on which he claims that the defendant was negligent. The plaintiff has failed to produce any evidence whatsoever of any specific defect in the roof, but seems to rest his case upon a presumption that because the accident took place it must have

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been by reason of a defect in the roof for which the landlord must be regarded as responsible. No such presumption, however, arises in such a case as this. He had it in his power to produce a witness who could have thrown some light upon the causes of the occurrence, but he failed to do so. According to his own evidence, on the day in question he sent his own plumber to the roof of the extension for the purpose of remedying the evil, and there is evidence tending to show that he was successful, but what it was that he discovered there or what he did in no way appears beyond a statement made by one of the witnesses of the defendant that in a conversation with the plaintiff the latter informed him that the difficulty was in the pipe, and showed him a piece of old broom and some glass which he stated the plumber had taken therefrom. The testimony offered on the part of the defendant showed that the roof upon the extension was new, having been constructed some seven or eight months before the occurrence; that it had been properly constructed, and was sound and in all respects in good order and condition. This was not contradicted by any witness produced by the plaintiff who had seen or made any examination whatsoever of the place.

After a careful examination of the record I am unable to discover sufficient evidence of negligence on the part of the defendant to support a recovery in this action — certainly nothing to support a finding that there was the slightest preponderance of proof in favor of the plaintiff. The judgment should, therefore, be reversed.

Judgment reversed and new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellant, *v.* WILLIAM D. BRUNS, Respondent.

(Supreme Court, Appellate Term, June, 1898.)

Action for failure to deliver tickets with coal — Laws of 1897, chap. 174.

An action for the penalty, prescribed by section 3 of chapter 174 of the Laws of 1897 for a failure to accompany the delivery of a ton of coal with the delivery tickets required by the statute, cannot be defeated by proof that the dealer delivered full weight.

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APPEAL from a judgment of the District Court of the City of New York, sixth judicial district, dismissing the complaint.

John Whalen, counsel to corporation (Adrian T. Kiernan, of counsel), for appellant.

W. D. Bruns, for respondent.

BEEKMAN, P. J. The undisputed evidence in the case demonstrated that the defendant had incurred the penalty prescribed by chapter 174 of the Laws of 1897, for a failure to accompany the delivery of a ton of coal with the delivery tickets which the statute (section 3) requires to be given in such a case. The justice dismissed the complaint largely on the ground that the defendant had delivered full weight, and that the mischief which the statute was intended to prevent did not exist in this case.

It is hardly necessary to say that the position thus taken was utterly untenable, and if sustained, would operate as a repeal of the statute. The duty enjoined is to deliver the tickets with the coal, and the penalty imposed is not for a failure to deliver full weight, but for a neglect to furnish the tickets. The court has no power to suspend the operation of a statute in an individual case because, upon the facts there disclosed, it may seem to be unfair or inequitable to enforce it. The plaintiff was absolutely entitled to judgment for a sum not exceeding $50, to be determined by the justice, and it was, therefore, error to dismiss the complaint, for which the judgment must be reversed.

Judgment reversed and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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LEWIS ABRAMS, Respondent, *v.* THOMAS C. PLATT, as President of the United States Express Company, Appellant.

(Supreme Court, Appellate Term, June, 1898.)

Common carriers — Delivery to the carrier.

In an action where the issue was whether the plaintiff had delivered certain goods to the defendant, an express company, it appeared that he was a regular customer, furnished with a placard which he exposed when he wished an express wagon to call and also with a book of blank receipts. After the plaintiff had exhibited his placard on a certain day, a stranger, who had the name of the company inscribed on a shield on his cap, came in the store while there was, on the other side of the street, "a sort of yellow wagon" on which the company's name appeared, signed a receipt and took away the goods. It did not appear that he came from or returned to the wagon, nor was it shown who owned the wagon. The company repudiated the whole transaction, including the name of the alleged agent as signed in the book.

Held, that no delivery was made out.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the City of New York, borough of Manhattan, ninth district.

Francis G. Kimball, for appellant.

Joseph A. Davis, for respondent.

BEEKMAN, P. J. The plaintiff sues to recover the value of certain goods, which he alleges were received by the defendant's company for transportation, but never delivered. The only issue in the case is whether the property was ever so received by the defendant, and upon this the trial justice found in favor of the plaintiff and awarded judgment accordingly.

After a careful consideration of the question, we are of the opinion that the evidence was insufficient to support such a finding. The plaintiff showed that he was a regular customer of the defendant's company, and had been supplied by it with a card intended to be placed outside of his store as a notice to the company that he re-

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quired its services whenever such was the case. He had also received from it a book containing a large number of shipping receipts in blank, bearing upon them in printed form the company's name and the conditions upon which goods would be received and carried by it. Whenever the plaintiff desired to make a shipment through the company he would display the card, and when the company responded through its agent, the latter would receive the goods and at the same time would sign one of the blanks, properly filled out, which were contained in the receipt-book above mentioned. This book at all times remained in the possession of the plaintiff.

It appears that on the 14th day of April, 1897, the plaintiff, having a shipment to make, exhibited his card, and apparently in response to the call thus made, a man entered his store, received the packages from the shipping clerk, signed one of the receipts in the book and took the goods away. The clerk says he had a shield on his cap inscribed "United States Express Co." and that on the other side of the street there was "a sort of a yellow wagon" on which the company's name appeared. He did not, however, see the man come from the wagon referred to or return to it, nor did he observe what he did after he left the store with the goods. Upon his examination he gave the following testimony: "Q. Do you know the man to whom you delivered the goods? A. No, sir. Q. You had never seen him before? A. I don't remember. Q. There are new men all the time? A. Once in a while their steady man is not on, and they put a different man on. Q. They are changing all the time? A. Not all the time. Q. Sometimes they have strange men? A. Yes, sir. Q. Have any men called for United States packages that month other than the steady man? A. No, sir."

This is all the proof that was given on the part of the plaintiff to establish a delivery of the goods to the defendant's company. A motion to dismiss the complaint having been denied, the defendant offered proof tending to show that it had never received or transported any such goods; that on the day in question the only men in their employment covering the route which included plaintiff's store were four of their "steady" men, none of whom bore the name signed to the receipts, and that there was no such person in their employ bearing that name.

Taking the evidence as a whole, we do not think that the plaintiff established a delivery to the company. The burden rested upon him of showing by a preponderance of proof that the person as-

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suming to act for the company was its agent, or that the company was in some way chargeable with responsibility for his acts. As was said in the case of Cronkite v. Wells, 32 N. Y. 247, "As there must be an actual delivery to the carrier, or to some person authorized to act in his behalf, before his responsibility as such commences, of course it was incumbent upon the plaintiffs to show a delivery of the package to the defendants, or to someone authorized to receive it on their behalf, before they could be charged with the loss."

At the outset it may be taken to be well-settled law that the extra-judicial declaration of a person that he is the agent of another is not competent evidence of the fact. Stringham v. St. Nicholas Ins. Co., 4 Abb. Ct. App. Dec. 315, 320. The existence of the relation must be established by direct proof or by circumstantial evidence tending to connect the alleged principal with the person assuming to act for him of such probative force as to fairly exclude any other reasonable hypothesis than that the relation actually existed. In the latter class of cases the ultimate fact rests upon presumption, and the question in each case necessarily is: Are the facts expressly proven sufficient to support such a presumption? We are unable to find that such is the case here. There is not a single fact in evidence tending to sustain or in any way justify such a conclusion. The alleged agent was an utter stranger to the plaintiff, and had never before assumed to act for the defendant. He had, it is true, a badge upon his cap with defendant's name upon it, but there is nothing in the case from which the slightest inference can be drawn that he received it from the defendant. It is also true that a wagon with defendant's name on it was seen on the street at the time, but there is no proof either that it belonged to the defendant or was under its control or that the alleged agent came from it or returned to it or had anything whatsoever to do with it. He did not even produce the defendant's form of receipt, but as we have seen, signed one which the plaintiff had in his own possession. There is, therefore, nothing to show that he was invested by the defendant with any indicia of authority.

In the case of Hughes v. N. Y. & N. H. R. R. Co., 36 N. Y. Supr. Ct. 222, the evidence showed that the person, claimed to be the servant of the defendant, was upon one of its trains, wearing a brakeman's cap and performing certain duties in connection with the operation of the train in association with the engineer, conductor and other persons who were engaged in its management.

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The court held that this was sufficient to support a presumption that he was a servant of the defendant. In Norris v. Kohler, 41 N. Y. 42, where the plaintiff sued to recover damages for injuries arising from the negligence of a person who was driving a wagon, it was held that proof of defendant's ownership of the horse and wagon would support a presumption that the driver was his servant. In the case of Svenson v. Atlantic Mail Steamship Co., 57 N. Y. 108, it was also held that proof of the ownership and control and management by the defendant of a steamship was *prima facie* evidence that a person working thereon was in its employ. At page 111 of the report the court say: "A mere admission of ownership would not have been significant, but the admission, that at the time the defendant controlled and managed the vessel, unexplained, leads inevitably to the conclusion, that those who were then employed upon her were the servants of the defendant."

The distinction between these cases and the one at bar is obvious. In each there was evidence showing that the alleged agent was working with or upon the property of the defendant under circumstances from which it might reasonably be inferred that he was so doing with the defendant's authority. No such elements exist in the case at bar, and the trial justice should have granted the motion which was made at the close of the plaintiff's case to dismiss the complaint. The proof that was subsequently given by the defendant not only in no way supplemented the weakness of the plaintiff's case, but served to dispel the slightest doubt which might have existed upon the subject; so that at the close of the entire case there was an utter failure of proof that the goods in question had ever been received by the defendant's company. The plaintiff was undoubtedly the victim of an ingenious fraud, but that is his misfortune for which the defendant is in no way legally responsible. The trial justice, therefore, erred in awarding judgment for the plaintiff, and for this error there must be a reversal.

Judgment reversed and a new trial ordered, with costs to the appellant to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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WILLIAM H. CLAPP, Appellant, *v.* JACOB STERNGLANZ et al., Respondents.

(Supreme Court, Appellate Term, June, 1898.)

Notice of appeal — Amendment.

A written notice that a party defeated in a Municipal Court of the City of New York "appeals to the Appellate Division of the Supreme Court of the state of New York, first judicial district" sufficiently apprises his adversary that the appeal is to the proper tribunal, the Supreme Court, and, although there is a misdescription of the particular branch of that court where the appeal may properly be heard, the adversary has not been misled and the appellant should be allowed to amend his notice by substituting the "Appellate Term" for the "Appellate Division."

MOTION for leave to amend a notice of appeal from the Municipal Court of the City of New York, borough of Manhattan, tenth district, to this court.

Reno R. Billington, for appellant.

Platzek, Stroock & Herzog, for respondents.

BEEKMAN, P. J. The plaintiff, intending to appeal from the judgment to this court, served a notice of appeal which ran as follows: "Take notice that the plaintiff, William H. Clapp, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, first judicial district, from the judgment rendered against him in the above-entitled action, in favor of the defendant, Jacob Sternglanz, with ten dollars costs, on the 27th day of April, 1898, and from the whole and each and every part of said judgment." Upon the receipt of this notice the attorney for the defendants returned it with a formal indorsement thereon that an appeal to the Appellate Division from such a judgment could not be taken. Thereupon this motion is made by the plaintiff for an order correcting such notice by substituting the word "term" for the word "division," and requiring the defendants and the justice of the Municipal Court in which the judgment was rendered to receive such notice as amended as of the date of the service of the original notice.

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The attorney for the plaintiff states in his affidavit that he dictated the original notice to a stenographer, describing the court to which the appeal was taken as the "Appellate Term of the Supreme Court;" that the error made was that of the stenographer in transcribing his notes, and was not observed by him at the time the notice was served.

While the courts acting under sections 1303 and 3049 of the Code of Civil Procedure, the latter of which applies to appeals from the District Courts, now the Municipal Court of the City of New York, have been very liberal in allowing amendments to such notices, it may be said that the limit of permissible action in that regard is reached where the proposed amendment is either inconsistent with the terms of the original notice as far as it went, or extends its operation to a subject-matter, such as another judgment or order, to which originally it did not refer. It is contended that such is the case here, and that the amendment asked for so far changes the original notice as to substitute another appellate court for the one which was originally designated therein. Certainly if that be the case, the motion cannot be granted, as it would be really authorizing an appeal to be taken after the time so to do has expired, and that the court has no power to do either directly or indirectly. It becomes necessary, therefore, to consider the nature and legal effect of the notice of appeal in question as it stands.

Section 1340 of the Code of Civil Procedure provides among other things that "Appeals from inferior and local courts heretofore heard in the Court of Common Pleas for the city and county of New York and the Superior Court of Buffalo may be taken to the Supreme Court." As the appeal here comes within this description, it is governed by this section. By section 1344 of said Code it is further provided that "An appeal taken as prescribed in this title, must be heard by the Appellate Division of the Supreme Court, except that appeals from the judgments of any District Court or of the City Court of the City of New York, may be heard by the Appellate Division of the Supreme Court, or by such justice or justices of the Supreme Court as may be designated for that purpose by the justices of the Appellate Division sitting in the first judicial department."

It will be observed that the right of appeal is conferred exclusively by section 1340, which names the court to which such an appeal must be taken. The appeal lies to the Supreme Court, not to the Appellate Division of that court, and strictly speaking the

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notice of appeal should describe the appellate court as the Supreme Court of the State of New York, first judicial district, without qualification. Section 1344, as is very clear from the language there used, relates not to the tribunal to which the appeal is taken but to the part of the court where the appeal is to be heard. Whether it is to be heard by the Appellate Division or by other justices of the Supreme Court rests in the discretion of the former. If no designation is made, then the appeal must be heard by the Appellate Division; if a designation be made, then the hearing must be had before the justices so designated. But whichever it may be, the power thus exercised has the source of its authority in the jurisdiction which belongs to the court at large and not to the particular arm of the court through which it finds expression in action.

The reference in the notice of appeal under consideration to the Appellate Division must be regarded, then, as indicating rather the place of hearing than the court to which the appeal is taken. But it is the function of a notice of argument to describe the place in which the hearing is to be had, not of a notice of appeal. The former relates to a matter of procedure after an appeal has been taken; the latter is, as it were, the process which initiates the appeal and confers jurisdiction upon the court to entertain it. The one is like a notice of trial, which indicates the part of the court where the action is to be tried; the other resembles the summons which commences the action and determines the court in which it is brought, but is silent with respect to all other matters. Bearing in mind this clear distinction between that which relates to jurisdiction and that which refers only to the manner in which such jurisdiction is to be exercised after it has been acquired, the solution of the question before us is not difficult. It is manifest that the appellant intended to appeal to the Supreme Court upon the face of the notice itself. Apparently he has described the court under a designation which is applicable only to a division or part of it, an error which was the natural result of a failure to observe the distinction above pointed out. But taking the notice as a whole, it is plain that what the appellant has done is to express in his notice both the court to which the appeal was taken and the part of the court where it was to be heard. The notice is, therefore, to be construed as if it had run "to the Supreme Court of the State of New York, first judicial district, to be heard at the Appellate Division." This is what was meant, and any other construction would seem to be quite unreasonable. It is true that the Appellate Division in this department is

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not the appropriate body for the hearing of such appeals in the first instance. But the error thus made by the appellant was with respect to a matter not essential to the notice of appeal and cannot, therefore, be considered as in any way fatal to its validity. The words to which objection is made might well be considered as surplusage and can be rejected without changing the character of the appeal itself.

It has become the practice in this district in taking appeals from the District Courts and the City Court to the Supreme Court to refer to the appellate court in the notice as "The Appellate Term of the Supreme Court," etc. For the reasons which I have given, this also is not technically correct. But would anyone for a moment contend that the notice was, therefore, void, or that the language so employed meant more or less than a joint designation of the court appealed to and the part of the court where the appeal is to be heard? The words "Appellate Term" have been employed by the Appellate Division in this department for the purpose of conveniently describing the justices whom they have designated to hear such appeals, and while properly used in a notice of argument, they have, technically speaking, no appropriate place in the notice of appeal itself, although their presence in such notice does not affect its validity.

In view of what has been said, it is plain that the attorney for the respondent should have accepted and retained the notice of appeal, and we are, therefore, bound to consider that a valid appeal from the judgment complained of is now pending in this court. But inasmuch as the notice contains a misdescription of the branch of the court in which the hearing is to be had, the appellant may take an order correcting the same and directing the attorney for the respondent and the clerk of the court below to accept the notice.

The motion is, therefore, granted, as above indicated.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Motion granted.

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AUGUST ZINSSER, JR., as Executor, etc., of EMIL NOEGGERATH, Deceased, Respondent, *v.* JOHN G. HERRMAN et al., Appellants.

(Supreme Court, Appellate Term, June, 1898.)

Summary proceedings — Demand of rent by mail.

Where the only demand of rent, made by a landlord of his tenants, consists in the mere mailing to them, by his agent, of a bill stating in detail the amount due, and he has not served upon them the alternative three days' notice in writing prescribed by statute, he has not sufficiently complied with the requirements of subdivision 2 of section 2231 of the Code of Civil Procedure to procure the dispossession of the tenants, who hold over.

APPEAL from a final order in summary proceedings in favor of the respondent made by the justice of the Municipal Court of the City of New York, borough of Manhattan, first district.

Benno Loewy, for appellants.

E. Ormonde Power, for respondent.

BEEKMAN, P. J. This proceeding was instituted for the purpose of dispossessing the appellants from the demised premises on the ground that they held over and continued in possession thereof, without the permission of the landlord, after a default in the payment of rent which became due on the 1st day of January, 1898. Upon the return day of the precept the appellants appeared by counsel and interposed an answer to the petition, which, among other things, denied that said rent had been demanded personally of the tenants, or of either of them, or that any demand whatsoever had been made for the same upon them, or either of them, or that three days' notice in writing requiring in the alternative the payment of the rent or the possession of the premises had been served upon the tenants, or either of them, as prescribed by law.

It is unnecessary for us to consider any of the other objections which have been made to the regularity of the proceedings, in view of the conclusion to which we have come that the point which we have specifically stated is well taken. Section 2231 of the

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Code of Civil Procedure provides, among other things, that a tenant may be removed from the demised premises (subdivision 2) where he holds over without permission of the landlord "after a default in the payment of rent, pursuant to the agreement under which the demised premises are held, and a demand of the rent has been made, or at least three days' notice in writing, requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served, in behalf of the person entitled to the rent, upon the person owing it, as prescribed in this title for the service of a precept." It is not claimed in the present case that the three days' notice in writing above provided for was ever given, the respondent relying upon what he claims was an unqualified demand of the rent, a demand which in the petition upon which the precept was issued he states was a personal one upon the tenants. His allegation in this regard, however, was entirely unsupported by any evidence. It appears that it was the practice of his agent whenever rent became due from his tenants to send to them by mail a bill for the same in the usual form, and there was produced upon the trial a paper which the agent swore was an exact copy of a bill for the rent in question which he mailed to the appellants on the 3d day of January, 1898.

It ran as follows:

"NEW YORK, *January* 1, 1898.

"John and Augusta Herrman, 15 Walker street, city.

"To C. H. Diamond & Company, Agents, Dr.

"To rent of store and basement No. 15 Walker street as per bills rendered to December 31, 1897	$725 00
"To rent of store and basement No. 15 Walker street for month of January, 1898, as per lease	125 00
	$850 00

"Received payment,"

It is upon this proof and this proof only that the respondent relies for the purpose of establishing his statutory demand for the rent which conditions his right to institute these proceedings. It seems to be well established that the demand which the statute requires must be a personal one. Wolcott v. Schenk, 16 How. Pr. 449; People ex rel. Simon v. Gross, 50 Barb. 231, Supreme Court,

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General Term, First Department, 1867; Tolman v. Heading, 11 App. Div. 264.

It was held in Wolcott v. Schenk, *supra*, that the demand meant by the statute is the common-law demand, with all the precision and niceties which the latter involved; and Mr. Justice Brown, in his opinion, reviews at considerable length the authorities upon the subject. While the courts have not been disposed to follow this case to its full extent, there has been a concurrence at least in the view that the demand must be a personal one made upon the tenant. In the case of People ex rel. Simon v. Gross, *supra*, Sutherland, J., giving the opinion of the General Term, says: "The demand mentioned in the statute as distinguished from the notice in writing means no doubt *a personal demand.*" This case was referred to with approval in Tolman v. Heading, *supra*, where the court, referring to subdivision 2 of section 2231 of the Code of Civil Procedure, says: "The demand required by such section is a personal demand; that is, one made to the tenant personally and for the payment of the rent absolutely as distinguished from the three days' notice to pay or surrender possession of the premises." At page 266 the court further says: "The burden was, therefore, put upon the petitioner of proving by competent evidence, either a personal demand of the rent or a service in the manner required by section 2240. These proceedings are statutory and must be strictly followed."

The construction thus given to the section in question is supported by reason as well as authority. The purpose of such proceedings is to enforce a forfeiture of an interest in real property incurred by the tenant by reason of his failure to comply with a condition upon the performance of which the continuance of his estate is predicated. In view of the grave consequences following such a forfeiture, it has always been the policy of the law to insist that he who purposes to take advantage of it should seek out the person against whom it is sought to establish the forfeiture, and demand of him a performance of the condition in unequivocal language, and under circumstances which would place that person immediately in a position to satisfy the demand and save his estate. It is obvious that a proper compliance with this requirement could not be had unless the demand was a personal one. It is true that the statute provides an alternative in the shape of the service upon the tenant in the same manner as a precept is required to be served, of three days' notice in writing requiring in the alternative the pay-

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ment of the rent or the possession of the premises. The landlord has the election to do this or to make a demand, but where he elects to make the demand and to rest solely upon that, nothing short of an exact compliance with all that the word, as used in the statute, imports can be accepted. In other words, the demand must be personal. If it is less than that, and the alternative notice in writing has not been given, he has no right to institute a dispossess proceeding, nor has the justice any authority to make a final order in his favor. Such is the condition of this proceeding, and it necessarily follows that the order appealed from must be reversed.

We are also asked to direct a restitution of the premises under section 2263 of the Code of Civil Procedure. We are not disposed to do so forthwith, owing to the very meager statement contained in the papers with respect to the duration and other elements of the lease, and also in the absence of proof of what has taken place with respect to the occupancy of the property since the final order was made. If restitution be desired, a motion should be made for that purpose.

Final order reversed, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Order reversed, with costs.

NELSON A. MILLER et al., Appellants, *v.* CHARLES SMITH, Respondent.

(Supreme Court, Appellate Term, June, 1898.)

Payment — Proof.

Where proof of payment, denied by the creditor, rests upon the evidence of the debtor and his clerk that payment was made to the creditor's agent, a finding of payment will be reversed where a receipt given to the debtor is not produced by him, nor its absence satisfactorily explained, nor its last custodian produced.

APPEAL from a judgment of the Municipal Court of the City of New York, borough of Manhattan, seventh district, rendered in favor of the defendant.

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Milton Mayer, for appellants.

Henry J. Goldsmith, for respondent.

BEEKMAN, P. J. The only issue in this case was whether the amount sued for had been paid or not. The justice below has found for the defendant, and if there had been a fair conflict of evidence upon the point, we should not undertake to disturb his judgment. We think, however, that the evidence was not sufficient to support it. The defendant claims that he paid the amount in controversy in bills to a person representing himself to be the agent of the plaintiffs. In this he is confirmed by the testimony of one Stern, who was his clerk, and who stated that both he and the bartender of the defendant were present at the time. The bartender was not produced, and no reason is given for the failure to do so. The defendant and Stern both testified that upon the payment of the money, the person to whom it was paid gave to the defendant a receipted bill; that the defendant thereupon handed it to Stern, directing him to deliver it to the bartender at defendant's down-town place of business for safe-keeping, which Stern says he did. The receipt, however, was not produced upon the trial, the defendant stating that he was unable to find it. While there was some proof given tending to show that a search had been made, it was most unsatisfactory in its character and failed to show that it was prosecuted with any degree of thoroughness. The bartender to whom, according to Stern's evidence, it had been delivered, although still in the employment of the defendant, was not produced and examined upon the subject. An effort was made to identify one of the collectors of the plaintiffs named Moore, who was present in court, with the person to whom it was claimed the money had been paid. The testimony upon this point, however, was not of a positive character, while the defendant said "that is he," he immediately qualified his answer by adding "It looks very much like him," and the most that Stern was willing to say was that Moore resembled him, but that he would not say positively that he was the person. Against this inconclusive evidence the record shows that Moore himself was put upon the witness-stand and denied positively that any such payment had been made to him; that at the time in question he was not in the plaintiffs' employ and did not enter their service until two months after the time of the alleged occurrence, and in this he was corroborated by the testimony of Mr. Miller, one of the plaintffs. We are of the

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opinion that the evidence on the part of the defendant was not of such a character as to justify the justice in finding that there had been a payment of the amount sued for, and that the judgment should, therefore, be reversed.

Judgment reversed and a new trial ordered, with costs to the appellants to abide the event.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

KITTIE RANDOLPH, Respondent, *v.* SIMON FEIST, Appellant.

(Supreme Court, Appellate Term, June, 1898.)

Negligence — Failure of landlord to protect tenant, while putting on a new roof — Exemptions by term of lease.

A landlord, who has covenanted to keep demised premises in a tenantable condition and who subsequently, and during the term, puts a new roof on the building, is liable to a tenant of the top floor whose flat is, owing to the negligence of the landlord, his servants or agents, damaged by large quantities of rain water which ran through the roof while the change was being made.

The landlord is not exempted from liability for such damages by a clause in the lease, reading "The landlord shall not be liable for any damage caused by leakage of water or for any cause or event", as the leakage here contemplated must be deemed to refer to such an one as might result from ordinary wear and tear, or from the carelessness of tenants, or from the sudden action of the elements.

APPEAL from a judgment of the Eleventh District Court in favor of the plaintiff.

M. Jacobs, for appellant.

J. M. Lathrop, for respondent.

GILDERSLEEVE, J. The pleadings herein are in writing, and the complaint alleges that the defendant is the owner of the premises 687 Amsterdam avenue, which is a flathouse, and that, at the time

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of the alleged injury, the plaintiff occupied the fourth flat, as tenant of the defendant. It is further alleged that, owing to a defective and leaky roof, due to the negligence of defendant, his agents or servants, large quantities of rain water ran through said roof into and flooded said apartments and premises of this plaintiff, damaging thereby certain property specified by plaintiff, and rendering the premises unfit for habitation. It is further alleged that the defendant agreed to keep the premises in a tenantable condition, and that he knew that the roof was defective and leaky. The defendant, by his answer, admits the ownership of the premises, the tenancy of plaintiff, and the alleged agreement to keep the premises in a tenantable condition; but he denies that the overflow of water and the resultant injuries were due to his negligence. The defendant urges several grounds for a reversal of the judgment, the most important of which is the claim that no negligence on his part is shown. There is no claim of contributory negligence on the part of the plaintiff, and, although, from an examination of the testimony and a perusal of the briefs, it appears that other issues were considered by the contending parties, it may fairly be said that the plaintiff rested the alleged liability of defendant upon his negligence. The alleged damage occurred while a new roof was being placed upon the premises by defendant. The issue presented by the pleadings was as to the degree of care exercised by defendant in the execution of the work. If there was any liability to plaintiff for the damage she sustained, it was due to the failure of defendant to make every effort reasonable to avoid the injury. The burden was upon the plaintiff to establish the negligence of defendant by a fair preponderance of evidence. An examination of the testimony discloses a considerable conflict on this point. In rendering judgment against the defendant, it is to be assumed that the trial justice found that there was negligence on the part of defendant in the execution of the work; and, as such finding is not against the weight of evidence, this court will not interfere with the conclusion reached by the trial justice.

It is also urged by defendant that he was exempted from liability for any damage of the character that plaintiff seeks to recover for, by reason of the following clause in the lease, to-wit: "The landlord shall not be liable for any damage caused by leakage of water or for any cause or event." Clauses of this nature, exempting the landlord from what is incident to his obligation to keep the building in repair (see Rauth v. Davenport, 60 Hun, 72), are to be

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construed strictly; and, to get at the real intent of the parties, covenants that are in large and general terms are frequently narrowed and confined. What this clause means is not leakage produced by the negligence of the defendant, or of a person or persons employed by him, in putting on a new roof; but it has reference to a leakage which may result from ordinary wear and tear, or from the carelessness of tenants, or from the sudden action of the elements. The damages here complained of were not the result of a leakage of the roof caused by the elements, but caused by the alleged negligent manner in which the work of putting on the new roof was done after the lease was executed and the plaintiff was in possession. Worthington v. Parker, 11 Daly, 561. An objection is also made to the amount awarded for damages, upon the ground of the insufficiency of proof. It is true, as claimed by the appellant, that the difference in value between the property injured and uninjured is the usual method of ascertaining the amount of damage (Berg v. Parsons, 35 N. Y. Supp. 782); but we think that there was sufficient evidence to enable the justice to arrive at a correct estimate of the difference in value of the property before and after the injury, and that the testimony fairly supports the finding of the justice on this branch of the case.

We are of opinion that the case of Sulzbacher v. Dickie, 6 Daly, 476, is an authority that fully supports the judgment in this case. There is much similarity in facts. In that case the landlord undertook to put a new roof on the building, the roof was not properly covered during the progress of the work, the rain came through and damaged the tenants' property; and the court held that "in the execution of the work, the landlord was bound to exercise all the vigilance and caution that the nature of the work required. As to the occupants of the building as tenants or subtenants, he was bound to use ordinary diligence in protecting them from injury naturally resulting from the character of the work undertaken. It consisted of the removal of an old and damaged roof to the building, and the substitution of a new one. The process in itself was of such a character that it naturally exposed the property of the occupants of the building to damage from the fall of rain, and the undertaking from its very nature exacted every reasonable effort to avoid injury likely to result. The defendant, having so undertaken, and engaged others, to do the work of this character, was responsible, not only for his own negligence, but also for the negligence of the persons with whom he contracted for its performance."

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We find no errors that call for a reversal of the judgment, which should be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

SAMUEL PENNIMAN, Appellant, *v.* AMELIA JANE LA GRANGE, Respondent.

(Supreme Court, Appellate Term, June, 1898.)

1. **Stipulation — It cannot be withdrawn on the trial.**

A written stipulation of the defendant, although made in an action on a contract before the answer was amended, admitting the making of the contract, part performance by the plaintiff as alleged in the complaint, and nonpayment by the defendant of certain required monthly installments, cannot be withdrawn upon the trial.

2. **Entire contract, payable in installments — Measure of damages.**

Semble, that a recovery *pro tanto* can be had on a contract to advertise a business for a year upon the payment of monthly installments, although the advertiser failed at the end of six months, it appearing that the customer had never paid any monthly installments whatever.

APPEAL from a judgment of the Eighth District Court, in favor of the defendant.

Ginsburg & Mathot, for appellant.

William J. Walsh, for respondent.

GILDERSLEEVE, J. On or about December 23, 1896, defendant entered into a contract with plaintiff's assignor, the United States Guide & Information Company, by which she employed said company for the term of twelve months from January 1, 1897, to advertise and recommend her restaurant; and, in consideration for such services, defendant agreed to pay said company the sum of $120, payable in monthly installments of $10, at the end of each month. Plaintiff claims that the company fulfilled its part of the

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contract for the six months ending June 30, 1897, and that there is now due on such contract for said six months the sum of $60. The defense is based upon the claim that the company failed to complete its contract for the entire year; that in July, 1897, it became defunct and went out of existence; and that the contract is an entire one, and no recovery can be had in the absence of complete performance.

On the trial, before any witness had been called, the counsel for the plaintiff offered in evidence the following stipulation, to-wit: "Defendant's counsel admits the making of the contract, the performance of the contract for the time specified in the complaint, and nonpayment." This stipulation was ruled out by the trial justice, on defendant's objection, upon the ground that it was irrelevant, incompetent and immaterial, and on the further ground that said stipulation applied only to the issues raised by the original answer, and not to those raised by the amended answer, which last was made and filed subsequent to the making of said stipulation. To this ruling plaintiff duly excepted.

It is a well-settled rule that where an absolute and unqualified admission is made in a pending cause, whether by written stipulation of the attorney, or as matter of proof on the hearing, it cannot be retracted unless by leave of the court. Converse v. Sickles, 16 App. Div. 49. We think the stipulation was material and competent, and that its rejection was error. It showed that plaintiff's assignor had fulfilled its part of the contract, for the first six months, and that defendant had defaulted in the payment of the monthly installments of $10, due at the end of each of these six months. In the case of Moore v. Taylor, 42 Hun, 45, it was held that a contractor who is entitled by the terms of the contract to receive payment of installments pending the work is entitled to recover such installments, notwithstanding his refusal to complete the work on account of their nonpayment; although such failure to pay installments when due, while it may authorize an abandonment of the work, will not entitle the contractor to recover prospective damages as it does not prevent performance. In the case of Strack v. Hurd, 28 Abb. N. C. 143, the General Term of the Supreme Court, in the third department, held that the law will not compel a contractor to complete performance of an entire contract, as a condition of recovery, where the other party has failed, on his part, to pay stipulated installments at the time they fell due, and while he is in default on such payments; but that, if such default exists,

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the contractor may recover for the work actually performed, at the contract price.

We are of the opinion that the judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

HARRIS LINDEN, Respondent, *v.* SAMUEL BRUSTEIN, Appellant.

(Supreme Court, Appellate Term, June, 1898.)

1. **Right to sue — The defendant cannot inquire into the terms of the plaintiff's assignment.**

   Where a party sues under an assignment of a cause of action, which is valid as against his assignor, the defendant has no legal interest to inquire whether the transfer was an actual sale, or merely colorable, or whether there was any consideration paid therefor, or what was the arrangement or understanding between the assignor and assignee respecting the ultimate disposition of the proceeds of the recovery.

2. **Witness — Impeachment.**

   Where, after the credibility of the plaintiff's assignor has been attacked by two witnesses, the defendant calls the assignor as his own witness, he cannot subsequently insist that he has been injured by the refusal of the court to permit him to swear a third witness in order to impeach the assignor.

APPEAL from a judgment of the Second District Court in favor of the plaintiff.

A. H. Sarasohn, for appellant.

John Callahan, for respondent.

GILDERSLEEVE, J. The action is for a conversion, and the defense is a general denial, payment and an allegation that plaintiff is not the real party in interest. The plaintiff is the assignee of one Simon Brinn. The Code, section 449, requires every action to be prosecuted in the name of the real party in interest; but the rule

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is that a plaintiff, suing upon an assigned claim, "is the real party in interest, under the Code, if he had a valid transfer as against the assignor, and holds the legal title to the demand; and the defendant has no legal interest to inquire whether the transfer was an actual sale or merely colorable, or whether a consideration was paid therefor. While such an inquiry may become material, if the rights of creditors are involved, or when some defense or counterclaim against the assignor is sought to be interposed, it constitutes no defense on the ground that the plaintiff is not the real party in interest." See Sheridan v. Mayor, 68 N. Y. 30. The assignment from Brinn to plaintiff was after the cause of action for the conversion had accrued, and the assignment transferred the title of Brinn to the property as well as to the cause of action. The plaintiff could maintain the action, and the consideration of the assignment was not material, so long as it was valid as between the parties to it. See McKeage v. Hanover Fire Ins. Co., 81 N. Y. 38. We do not think that there was reversible error in the refusal of the court to allow defendant's counsel to ask Brinn, on cross-examination, the following questions, "Q. Then did you take out the summons? Who paid for the summons in this case, you or Linden?" or the other similar questions referred to in the brief of the appellant. It is true that the court might well have allowed them, were it only with a view of tending to discredit Brinn's testimony by showing that he had an interest in the result of the action; but the refusal to do so, in view of all the testimony in the case, does not constitute such prejudicial error as to warrant us in reversing the judgment. Brinn gives the details concerning the assignment. He says, "I told Linden that I had a claim against Brustein; and as I live uptown, there is too much trouble for me to sue him in my District Court, and he wants to buy this claim of me, that he should buy it, and sue him in this court." Q. "What did Linden say?" A. "He was satisfied; he said all right." He swears the assignment was made, before the commencement of the action, at No. 57 Bayard street, in the house of Linden. There seems to be no doubt that the assignment was valid as against the assignor, and, as we have said, the defendant has no legal interest to inquire whether the transfer was an actual sale or only colorable, or whether there was any consideration paid therefor (see Sheridan v. Mayor, *supra*), or what was the arrangement or understanding between the parties respecting the ultimate disposition of the proceeds of the recovery. See Moore v. Robertson, 25 Abb. N. C. 173. The evidence is meagre and unsatisfactory in many important respects, but we think

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there is enough to warrant a finding of the facts above set forth. The plaintiff's assignor, Brinn, swears that, on December 18, 1896, defendant bought $64.93 of him "on memorandum," with the understanding that if the goods were not paid for they were to be returned; that the goods were not paid for; that he demanded their return, and that they were never returned, or paid for. Defendant admits that he owes plaintiff, or his assignor, $10 and some cents; but he claims that he had either paid for the rest, or returned the goods. He also denies that he ever bought as much as $64.93 of Brinn at any one time. On his cross-examination, Brinn is unable, apparently, to give the details of the bill of goods sold "on memorandum," to defendant, without recourse to his books for the purpose of refreshing his memory, and he merely says that the goods consisted of cloth. He, however, has furnished a bill of particulars, which is annexed to the return, and which gives the details. As we have said, the testimony leaves much to be desired as to definiteness and clearness in many important particulars, but there appears to be sufficient evidence to sustain the finding of the trial justice in plaintiff's favor. With regard to the point made under the amended return, that the justice refused to allow the defendant to put a witness on the stand for the purpose of impeaching the plaintiff's assignor, Simon Brinn, we may say, the defendant had produced two witnesses, who were examined solely for the purpose of attacking the credibility of Brinn, and had called a third witness for the same purpose, when the justice refused to allow such witness to be sworn or examined, to which the attorney for defendant excepted. The defendant's attorney thereupn called Simon Brinn, as a witness on behalf of the defendant, and examined him at length with respect to the merits of the action. This course appears to have been entirely inconsistent with the position which he had taken with respect to Brinn's credibility. By so doing, he gave him credit with the court, and precluded himself from following up the attack which he had made, and which, by his own act, he had in effect abandoned.

We do not find errors in the rulings of the justice, as to the admission and exclusion of evidence, of sufficient magnitude to require a reversal. It follows that the judgment, so far as assailed on this appeal, should be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

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CHARLES WILEY et al., Appellants, *v.* SIMON M. BONDY et al., Respondents.

(Supreme Court, Appellate Term, June, 1898.)

Negligence — Overflow of water upon tenant beneath.

In an action where damages were sought for alleged negligence, it appeared that a bath-tub, directly over a part of the floor of the plaintiffs, was found in the morning full of water, that the faucet was turned on, that there was some water on the floor of the bath-room, that the ceiling of the plaintiffs' room had fallen down and that the walls were soaked with water, which was also dripping from the ceiling. Although the bath-room was under the control of the defendants, they showed that it was never used for bathing purposes, that no one ever went into it, except the partners and their stockman, that no one could go into it unless some of these persons saw him, that they had seen no one go into it, and had not themselves turned on the faucet. They also showed that a plumber, in no manner an agent of the defendants, had been in the bath-room on the day before the overflow.

Held, that, while the plaintiffs had clearly established a *prima facie* case, the court would not interfere with the decision of the court below, made upon the whole case, that the plaintiffs were not entitled to recover.

APPEAL from a judgment of the Municipal Court of the City of New York, borough of Manhattan, for the third district, rendered in favor of the defendants after a trial before the justice of said court, without a jury.

T. W. Foster, for appellants.

Louis Steckler, for respondents.

GILDERSLEEVE, J. In September, 1897, the plaintiffs occcupied, for business purposes, the basement and first floor of the premises No. 53 East Tenth street, in this city. The defendants occupied, and were in possession and control, as tenants, of the second floor of said premises, which included a room in which was a bath, with two faucets opening into the same. The defendants also occupied

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the second floor of an adjoining building, communicating with the second floor, above mentioned, by means of a door. This adjoining building was not the property of the landlord from whom the Tenth street premises were rented, but belonged to the Lorillard estate. In the morning of September 11, 1897, the plaintiffs' premises were found to be injured, and some of their property destroyed, by reason of the overflow of water from the premises occupied by defendants, as aforesaid. The ceiling of the plaintiffs' back room, which was under the bath-room on the defendants' floor, had fallen down, the walls were soaked with water, and water was upon the floor, while drops of water were hanging to the ceiling, and the mortar and lath were damp. The claim of the plaintiffs, that the overflow came from the bath-room on defendants' floor, is fully established by the evidence. The testimony shows that an inspection of the bath-room, at the time, disclosed the fact that the faucet was turned on; that the tub was full of water to the top; and that there was some water on the floor. It further appears that, although there was no water running at the time, the water pressure in that neighborhood was much greater at night than in the daytime; and from all the circumstances disclosed, the conclusion is irresistible that the water came from the overflow of the bath-tub in defendants' premises on the previous night. The plaintiffs brought this action to recover damages for the injury sustained by reason of this overflow. As we have seen, the overflow came from defendants' premises, and was brought about by some one leaving the faucet on defendants' premises open during the night, and omitting to remove the stopper from the tub. The bath-tub was shown to be in the control of defendants, and, in the ordinary course of things, an overflow like the one in question does not happen if reasonable care is used. In the absence, therefore, of any explanation by the defendants, it might well be said that the overflow arose from want of care on the part of the defendants. The facts, above set forth, clearly established a *prima facie* case of injury to the plaintiffs from the defendants' negligence. The motion, therefore, to dismiss the complaint at the end of the plaintiff's case was properly denied. See Greco v. Bernheimer, 17 Misc. Rep. 592; Simon-Reigel Co. v. Gordon-Burnham Co., 20 id. 598.

The excuse or explanation offered by defendants is as follows: That the bath-room was not used for any purpose; that it was located at the extreme end of the left; and there were basins and toilets in other parts of the building for the use of the employes,

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which were at least thirty feet from this bath-room; that the room adjoining the bath-room, and forming the left of 53 East Tenth street, was used as a cloth and stock room, and no one could get into the stock-room, and, therefore, by no possibility into the bath-room, without passing the defendant, Isidor Krotosky, or the stockman, or Isaac Krotosky, who was there in charge whenever Isidor was absent; that no one ever went into the stock-room, except the partners and the stockman; that no one ever had permission to go into the stock-room, except these men; that no one of the employees went into the bath-room, for the reason that neither of the partners, nor the stockman, nor Isaac Krotosky, ever saw any one go in, and that they, or one of them, would have been certain to have seen any one who attempted to go into that bath-room; that none of the partners nor the stockman ever used the bathroom themselves, and neither of them turned on the faucet or put in the stopper in the tub. It does appear, however, from the testimony, that a plumber, in the employ of the Lorillard estate, went through the entire premises, including this bath-room, the day before the flood. It does not appear that this plumber was, in any way, the agent of the defendants; and if he left the faucet open, it was not the act of the defendants or of one for whose act they were responsible.

We thus see that the defendants offered much evidence, in explanation of the mischief complained of, which tended to negative want of care on their part. They did not deny the overflow, nor the injury caused thereby, but contested their alleged liability by undertaking to show that they exercised every reasonable care in regard to the tub and faucets; and they established a series of facts, if the trial justice gave credit to the testimony offered, tending to show their freedom from negligence. The duty devolved upon the trial justice of determining, by a consideration of all the testimony, including the presumption created by the introduction of the plaintiffs' testimony before explanation on the part of the defendants, whether or not the alleged negligence of the defendants was established. The burden of proof was upon the plaintiffs to show, by a fair preponderance of evidence, negligence on the part of defendants. The burden of proof always remains upon the party who has the affirmative of the issue. From certain facts presumptions may arise, but those presumptions are merely evidence, like other proof in the case. When the case was finally submitted to the justice, weighing presumptions, proofs and all the evidence, the burden of proof was upon the plaintiffs to establish affirmatively

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the negligence of the defendants. A presumption does not shift the burden of proof. See Jones v. Union Ry. Co., 18 App. Div. 267. The learned trial justice has decided that the plaintiffs have not met the requirements imposed upon them in this respect, and with that decision we do not feel called upon to interfere.

There are no questions of law presented on this appeal that require discussion, and it follows that the judgment should be affirmed, with costs.

GIEGERICH, J., concurs in result.

BEEKMAN, P. J. (concurring): It may have been sufficient to make out a *prima facie* case for the plaintiffs to show that the overflow which occasioned the damage came from the defendants' premises through a faucet which had been left open without evidence tending to show that this condition had been produced by the defendants themselves or someone in their employ. Moore v. Goedel, 34 N. Y. 527; Greco v. Bernheimer, 17 Misc. Rep. 592; Simon-Riegel Cigar Co. v. Gordon B. Battery Co., 20 id. 598. Assuming that such is the law, the rule still applies which requires the plaintiff to make out his case by a preponderance of evidence, and the burden of so doing continues with him to the close of the whole case. In other words, the presumption of fact upon which, in certain cases, the plaintiff may rely in the first instance in support of his case are rebuttable, and when the defendant has offered proof which dispels the presumptions, the plaintiff must resume the burden of establishing his cause of action by additional evidence.

In the case at bar, the evidence was purely circumstantial and inconclusive. The trial justice might well have come to the conclusion that it was so evenly balanced that there was no preponderance in plaintiffs' favor, in which event, of course, it was his duty to dismiss the complaint. It is contended, however, that the defendants as a matter of law were guilty of negligence because they did not inspect the faucet from which the water appears to have come, before leaving their premises on the night prior to the accident, and reference is made to the case of Simon-Riegel Cigar Co. v. Gordon B. Battery Co., *supra*, in support of this claim. That case, however, is quite different in its facts from the one under consideration. It may be that there is such a duty which the law recognizes where the faucet is in daily use, as it was in that case, but in the case at bar, it was shown that the bath-room where the

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faucet was, with its present equipment, was in the building when the defendants took their lease of the premises, that it was not adapted to the uses for which the premises were occupied, and that it had never been used for the purpose of drawing water by either the defendants or their employees. It can hardly be said, therefore, under these circumstances and as a matter of law, that any duty rested upon the defendants of making a nightly inspection of the plumbing of this place.

The case was tried before the justice below without a jury, and it was for him to determine whether, under all the circumstances of the case, the defendants had acted in the matter with ordinary prudence and care. How the faucet came to be open in no way appears. It was claimed by the plaintiffs that it must have been the act of the defendants or their servants. On the other hand, the defendants insisted that it must have been turned on by a plumber who had been employed by their landlord to make some changes in the plumbing elsewhere in the building, and who in making some investigations had gone into the bath-room to look at the plumbing there the day before the accident took place. It was for the trial justice to draw such inferences from the facts proven as in his judgment they seemed to warrant, and the burden rested upon the plaintiffs of establishing their cause of action to his satisfaction by a fair preponderance of proof. As we have already said, he might well, however, have determined upon the facts disclosed by the record that the evidence was evenly balanced, and that the plaintiffs had not sustained the burden of proof which the law cast upon them. Doubtless that was the reason why he dismissed the complaint. It is well settled that this court will not interfere with the action of the court below with respect to the weight of evidence, except to prevent palpable injustice in cases where his determination in that regard is obviously wrong.

The judgment should, therefore, be affirmed.

Judgment affirmed, with costs.

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THE RAILWAY ADVERTISING COMPANY, Respondent, *v.* THE BOSTON DENTAL ASSOCIATION, Appellant.

(Supreme Court, Appellate Term, June, 1898.)

1. When a contract is not entire.

Where an advertising contract, for placing cards in all Lenox avenue electric cars for a term of three months, provides that "the omission of any reasonable number of cards from the cars shall not constitute a violation of this contract, but the advertiser shall be entitled to a *pro rata* rebate for such cards as may have been omitted", the advertiser is not in a position to resist payment upon making proof that the cards were not shown in some of the Lenox avenue electric cars, as the contract cannot be deemed to be entire.

2. Jurisdiction of District and Municipal Courts of New York city.

The charter of the Greater New York, by its section 1351, particularly continues the District Courts of New York city under the name of Municipal Courts and, by its section 1352, provides that the justices, in office on January 1, 1898, shall continue for the remainder of their terms and shall be called justices of the Municipal Court.

APPEAL from a judgment of the First District Court, in favor of the plaintiff.

J. P. Davenport, for appellant.

Greene & Johnson, for respondent.

GILDERSLEEVE, J. Plaintiff and defendant entered into a contract, on or about August 25, 1897, by which advertising cards of defendant were to be placed for the term of three months, beginning October 1, 1897, in all Lenox avenue electric cars. By the terms of the agreement, defendant was to pay to plaintiff $30 a month. No payments were made, and plaintiff brought this action for $90. Defendant claims that plaintiff did not fulfill the requirements of the contract, for the reason that some of the Lenox avenue cars did not have the cards. Plaintiff admits that some of the cars running on Lenox avenue did not contain the cards, but claims that these cars belonged to the Madison Avenue Line, and were only making trial trips. The testimony is conflicting, and

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the court gave judgment for plaintiff to the extent of $70. The defendant claims that the contract was an entire one, and that no part of the consideration was recoverable, unless the whole of that for which the consideration was to be paid, was performed; and that there was no waiver by defendant of a full performance of the contract. It appears, however, that the contract particularly states that "the omission of any reasonable number of cards from the cars shall not constitute a violation of this contract, but the advertiser shall be entitled to a *pro rata* rebate for such cards as may have been omitted." The defendant also claims that the contract was not substantially performed, and also calls in question the jurisdiction of the court below. We are of opinion that there is sufficient evidence to support the finding of the trial justice, and that none of the points raised by appellant can be sustained. As to the question raised by the motion to set aside the summons, we may call attention to the fact that section 1351 of the charter particularly *continues* the District Courts under the name of Municipal Courts, while section 1352 of the charter provides that the justices, in office on January 1, 1898, shall *continue*, for the remainder of their terms, and shall be called justices of the Municipal Court.

The judgment must be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

ANTONIO CANTANCARITO, Respondent, *v.* THE SIEGEL-COOPER COMPANY, Appellant.

(Supreme Court, Appellate Term, June, 1898.)

Negligence — Care of an employer for the outer garments of its employees.

An employer exercises sufficient care in guarding the outer garments of its employees where it furnishes a wardrobe, situated in a locked inclosure and accessible, at stated times only, by a single door near which stands the desk of an employee, whose duty it is to remain at that place during the entire day and to see that none but the employees enter the locked inclosure; and where under such circumstances an employee loses his overcoat, he cannot recover its

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value of the employer upon the ground that it has been negligent, or that it has failed to perform any duty which it owed to the employee.

APPEAL from a judgment of the Municipal Court of the City of New York, borough of Manhattan, third district.

Rose & Putzel, for appellant.

E. Eschwege, for respondent.

GILDERSLEEVE, J. The court below awarded the plaintiff judgment for the value of an overcoat, lost while plaintiff was in the defendant's employ. Adopting a view of the testimony most favorable to the plaintiff, the facts are that the overcoat disappeared from an open wardrobe, on a floor of defendant's place of business, set apart for the reception of the outer garments of defendant's employees. This wardrobe was situated in a locked inclosure, from which the general public was excluded. Access could only be had, at stated times, through a single door, near which stood the desk of an employee, whose duty it was to remain at that place during the entire day, and see that none but employees entered the locked inclosure. After the plaintiff had been about a week in defendant's employ, he went, at the conclusion of a day's labor, to the wardrobe to get his overcoat, prior to leaving for the day, and found that it was gone. He made a demand upon defendant for the return of the coat, and, upon its failure to comply, he brought this action to recover the value of the overcoat.

The principle of law, upon which the trial justice seems to have rested the defendant's liability, is the negligence of defendant in not providing a sufficiently safe place for plaintiff's overcoat. We think it clearly appears that defendant discharged its full duty to the plaintiff, when it provided, as we have seen, a wardrobe in a locked inclosure, inaccessible to the general public, and under the guard and supervision of a competent employee. There is no evidence that the employee, who was stationed by the desk at the single door, through which alone access to the wardrobe could be had, was not a competent person and not well suited to discharge the duties to which he was assigned. There is no evidence to warrant the conclusion that the defendant did not exercise such care in this case, under the circumstances, as could be reasonably expected

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from an ordinarily prudent employer in furnishing accommodations for the outer clothing of his employees. Moreover, the arrangement for the custody of the plaintiff's overcoat, at the time of the loss, was the same as it had been during the whole period of the plaintiff's employment. The plaintiff made no complaint as to the character of the protection afforded for the custody of his outer garments; and whatever risk there was in the methods that had been adopted by the defendant, and were in use at the time, he was fully cognizant of and must be said to have assumed. The plaintiff accepted service, with knowledge of the conditions that prevailed at the time for the safe-keeping of the outer garments of employees, and cannot now be permitted to assert, as the basis of the defendant's liability for the loss he sustained, that they were inadequate and insufficient.

We think it clear upon the proofs that the defendant was not guilty of any negligence or lack of duty to the plaintiff which caused the loss complained of, and that the court below erred in rendering judgment in his favor.

Judgment reversed, and new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

ESTHER AARONSON, Respondent, *v.* THE PENNSYLVANIA RAILROAD COMPANY, Appellant.

(Supreme Court, Appellate Term, June, 1898.)

Common carrier — Liability as warehouseman — Receipt not qualifying liability — Unexplained loss.

A common carrier delivered to the owner, of a properly closed valise, a shipping receipt stating, among other things, "Property not removed by the person or party, entitled to receive it, within twenty-four hours after its arrival at destination, may be kept in the car, depot, or place of delivery of the carrier at the sole risk of the owner of said property." When, eighteen days after its arrival, the owner received and opened the valise, its contents were gone. The carrier offered no explanation of the loss, but showed that the valise had

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been carried in a sealed car, whose seals were not broken when it arrived, and that all the goods of the car were placed upon arrival on the floor of a dock, which had been well guarded.

Held, that the carrier was liable as a warehouseman, for the unexplained loss.

That the terms of the shipping receipt did not relieve it from its liability as a warehouseman.

APPEAL from a judgment of the Fifth District Court, in favor of the plaintiff.

Robinson, Biddle & Ward, for appellant.

J. J. Harris, for respondent.

GILDERSLEEVE, J. The plaintiff, on November 19, 1897, delivered to the agents of defendant a valise, containing articles of the value, as found by the trial justice, of $40, to be sent as freight from Philadelphia to New York by the defendant. Some eighteen days afterwards, she went to the company's place in New York, and made a demand for the valise, which was delivered to her by defendant's agents; but, upon opening it, upon such delivery, she discovered that the contents, contained therein, at the time of sending, had disappeared. The testimony shows that the valise was in good condition and properly closed, when it was delivered to the defendant; that it was sent right through to New York, and was stored on the defendant's dock "put on the floor on the dock." The shipping receipt, delivered by defendant to plaintiff in Philadelphia, at the time of sending the valise, contained this condition, viz.: "5. Property not removed by the person or party, entitled to receive it, within twenty-four hours after its arrival at destination, may be kept in the car, depot, or place of delivery of the carrier, at the sole risk of the owner of said property."

The court having refused to dismiss the complaint at the conclusion of plaintiff's case, the defendant offered evidence tending to show that the valise was carried in a sealed car, and that immediately before the discharge, at defendant's pier in New York, the seals were found to be intact; that this valise, so far as John Ryan, who discharged the goods, can remember, and so far as the tally, defendant's Exhibit 1, indicates, was apparently in good order, when removed from the car; that the goods, unloaded from trains,

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are placed on the floor on the dock; that a watchman is kept on the dock, one on each pier and a man on the floats; that a watchman is kept at the entrance of the dock to check what goes out. It must be said, from the foregoing facts, that the loss occurred after the defendant had ceased to be a carrier, and had become a warehouseman. Fairfax v. R. R. Co., 67 N. Y. 14. The duty, therefore, of defendant was reasonable care in the protection of the goods. Claflin v. Meyer, 75 N. Y. 260.

The principles of law applicable to this case are found in the following authorities, viz.:

In the case of Wynantskill Knitting Co. v. Murray, 90 Hun, 555, it is held that "After the lapse of a reasonable time for the consignee to remove the goods, the liability of the carrier as such ceases, and, if he is responsible thereafter, it is as a warehouseman."

In the case of Fairfax v. N. Y. C. R. R. Co., 67 N. Y. 14, Judge Rapallo used the following language: "it clearly appears that the portmanteau was taken in charge by the defendant and transported to New York, and there deposited by it in its baggage-room. The defendant thus incurred the responsibility of a warehouseman, at least, without regard to the question * * * whether it became liable as a common carrier. When the plaintiff demanded the article it had disappeared, and no account is given of the cause of such disappearance. This is *prima facie* evidence of negligence. * * * The proof of the general care, with which the baggage-room and its contents were guarded, was not sufficient to establish conclusively that there was no want of care in this particular instance."

In the case of Kaiser v. Latimer, 9 App. Div. 36, it is held that "A warehouseman, in the absence of bad faith, is liable only for negligence. The general rule is that the burden of proof remains where the issue made by the pleadings places it. A failure upon the part of a bailee to deliver to a bailor his property, on demand, raises a presumption of liability, but this presumption is *prima facie* only, and may be overcome by evidence; and where it appears that the loss was caused by some accident, the *onus* rests upon the bailor to prove that such accident was caused by the want of care upon the part of the bailee." It is further held that, although the plaintiff had made out a *prima facie* case, when he proved the defendant's failure to deliver the goods on demand, yet, as the basis of the plaintiff's cause of action was the defendant's negligence, the

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burden of proving such negligence rested upon the plaintiff, throughout the trial.

In the case of Stewart v. Stone, 127 N. Y. 501, it is held that, "While, as a general rule, when a bailee fails on demand, to deliver to the bailor property to which the latter is entitled, the presumption of liability arises, and, if the goods cannot be found it furnishes the imputation of negligence as the cause. But such *prima facie* case may be overcome when it is made to appear that the loss was occasioned by some misfortune or accident, not within the control of the bailee; and then the *onus* continues upon the bailor to prove that it was chargeable to the want of care of the bailee."

In the case of Claflin v. Meyer, 75 N. Y. 260, it is held that "In an action against a warehouseman for refusal to deliver goods entrusted to him, where the refusal is explained by the fact appearing that the goods were lost by a burglary, the burden is upon the plaintiff to establish affirmatively that the burglary was occasioned by, or was not prevented by reason of, some negligence or omission of due care on the part of defendant; the court will not assume, in the absence of proof, that the loss was the result of his negligence." It is further held in this case that "The warehouseman, in the absence of bad faith, is only liable for negligence, and one, bringing an action against him for the loss of goods must allege and prove negligence; this burden is never shifted; if plaintiff prove demand and refusal to deliver this unexplained is *prima facie* evidence of negligence; but if it appear that the goods have been lost by theft, plaintiff must show that the loss arose from the negligence of the defendant."

In the case at bar, we find, as above indicated, that after plaintiff had established a *prima facie* case of negligence on the part of the defendant, by proving the delivery of the valise and its contents to defendant, the demand for the same, and the failure of the defendant to deliver the contents, the defendant undertook to explain. It showed, as we have seen, the customary precautions taken to guard against loss; that the valise came from Philadelphia to New York, and was delivered at the dock of the company in apparently good condition. But no affirmative explanation whatever is given for the disappearance of the contents of the valise. It is not shown affirmatively that there was a loss by theft or by accident or by fire or by any other specified cause. Its explanation is that the goods are gone, and that it is unable to deliver them on plaintiff's demand;

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but the cause for the disappearance of the goods is left entirely to conjecture. The proof of the general care, with which baggage is guarded by the defendant, is not sufficient to establish conclusively that there was no want of care in this particular instance. See Fairfax v. R. R. Co., *supra*. It seems to us that the defendant has entirely failed to explain the loss or rebut the presumption of negligence on its part that was created by the plaintiff's testimony. The assertion by the defendant of the loss, without proof of some facts tending to show that the loss was occasioned by some misfortune or accident, not within the control of defendant, does not place upon plaintiff the *onus* of establishing defendant's want of care, beyond the presumption that arose, as we have already said, at the conclusion of plaintiff's case. Otherwise stated, the defendant showed no specific circumstances of loss, in respect of which it became the duty of plaintiff to show want of care on the part of defendant. The plaintiff fully sustained the burden of proof required under the circumstances.

It is urged by counsel for defendant that the liability of defendant in this case is qualified by the clause in the shipping receipt, above quoted; and that such stipulation, although not exonerating defendant from liability for its negligence, imposed upon plaintiff the burden of showing affirmatively that defendant was guilty of negligence. See Gleadell v. Thomson, 56 N. Y. 197; Steinweg v. Erie R. R. Co., 43 id. 123; Lamb v. Camden, etc., R. R. Co., 46 id. 272; Canfield v. B. & O. Ry. Co., 93 id. 532. We have already seen that the liability of the defendant in this case is that of a warehouseman, and that from plaintiff's evidence a presumption of defendant's negligence arose. This presumption has not been rebutted by defendant, and its want of care was, therefore, affirmatively established. The clause in question in the shipping receipt cannot be said to have relieved defendant from its liability as a warehouseman.

The judgment should be affirmed, with costs.

BEEKMAN, P. J., and GIEGERICH, J., concur.

Judgment affirmed, with costs.

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DANIEL C. POTTER, Respondent, *v.* THE NEW YORK BAPTIST MISSION SOCIETY et al., Appellants.

(Supreme Court, Appellate Term, June, 1898.)

Summary proceedings — Forcible detainer — Petition — Jurisdiction.

An allegation contained in the petition of a person seeking to regain possession of premises from which, as he alleges, he has been forcibly dispossessed, that, when so evicted, he was in the peaceable possession of the said premises, a second floor, "by virtue of a certain arrangement or agreement made and entered into between himself and Julia Ross as lessee of said entire premises (of which the floor occupied by your petitioner as aforesaid forms a part) by the terms of which agreement your petitioner duly became entitled to and went into possession of the floor occupied by him as aforesaid," fails entirely to comply with the provisions of section 2235 of the Code of Civil Procedure requiring such a petition to describe the premises "and the interest therein of the petitioner;" the petition confers no jurisdiction of the subject-matter upon a District Court of the city of New York, and the objection that it does not confer jurisdiction may be made after answer.

APPEAL by the defendants from a final order in summary proceedings awarding the delivery of the possession of certain premises to the petitioner, made by the justice of the District Court in the city of New York, for the fourth judicial district, upon a trial had without a jury.

The material facts are stated in the opinion.

John E. Parsons, for appellants.

Benjamin Scharps, for respondent.

GIEGERICH, J. These proceedings were brought by the respondent to regain the possession of the "second floor (being the second floor above the basement) of the premises or building known as the 'Church House' of the Tabernacle Baptist Church in the city of New York, and also designated by the number 162 Second avenue in said city," from which he claims he was forcibly dispossessed by the appellants.

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The petition alleges, that the petitioner, when so evicted, was in the peaceable possession of the said premises "by virtue of a certain arrangement or agreement made and entered into between himself and Julia Ross, as lessee of said entire premises (of which the floor occupied by your petitioner as aforesaid forms a part) by the terms of which agreement your petitioner duly became entitled to and went into the possession of the floor occupied by him as aforesaid."

The appellants insist that the court below did not acquire jurisdiction of the subject-matter of the proceeding for the reason, that the petition wholly fails to describe the interest of the petitioner in the premises pursuant to section 2235 of the Code of Civil Procedure, which in part prescribes: "The applicant must present to the judge or justice a written petition * * * describing the premises of which the possession is claimed, *and the interest therein of the petitioner*, or the person whom he represents; stating the facts, which, according to the provisions of this title, authorize the application by the petitioner."

When the proceedings were called for trial, and after the answer had been filed, the defendants objected to the jurisdiction of the court, and moved for a dismissal of the proceedings upon the grounds above stated, and the learned justice in denying the motion in part said:

"If this objection had been raised on the return day of the precept there is no doubt whatever in my mind but that it would have been well taken and it would have been my duty in a decision to sustain it. I am, however, of the opinion that inasmuch as you tendered the issue upon that very allegation and have come into court and answered the petition and have ever since the answering of the petition appeared several times in court without raising the objection, to raise it to-day is too late and the court has proper jurisdiction of these proceedings to try them. I am of the opinion that the counsel should have raised the objection before answering the petition." The defendants duly excepted, and this brings up for review the correctness of such ruling.

The above set forth requirements are part of the provisions of the Code of Civil Procedure, regarding "summary proceedings to recover the possession of real property" (chap. 17, tit. 2), which were compiled from Part 3, chap. 8, tit. 10, articles first and second of the Revised Statutes (2 R. S. 507-516), and amendments thereto. Throop's Anno. Code for 1891, p. 351.

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The enactments so superseded were divided into two articles, the first entitled "Of forcible entries and detainers," and the second, "Summary proceedings to recover the possession of land in other cases," and the remedies thereunder were different in substance and form.

Article first, *supra*, had its origin in the act respecting forcible entries and detainers (1 R. L. 96), which was of a criminal character, and though subsequently enlarged so as to embrace to a certain extent a civil remedy, the form of proceeding and the rules of law which governed it remained to a great degree unchanged. Wood v. Phillips, 43 N. Y. 152, 157.

Under the old acts, evidence to disprove the complainant's title was not admissible upon the trial of the indictment, it being sufficient for the party complaining, in order to recover, to show that he had been in peaceable possession before the defendant's entry. People v. Leonard, 11 Johns. 504; People v. King, 2 Caines, 98.

The principle of the decision of the above-cited cases was embodied in section 11 of said provisions of the Revised Statutes, which provided: "On the trial of such traverse, the complainant shall only be required to show in addition to the forcible entry or detainer complained of, that he was peaceably in actual possession at the time of a forcible entry, or was in constructive possession of the premises at the time of a forcible holding out."

The Code of Civil Procedure (§ 2245) contains the following provision: "Where the application is founded upon an allegation of forcible entry or forcible holding out, the petitioner must allege and prove that he was peaceably in actual possession of the property, at the time of a forcible entry, or in constructive possession, at the time of a forcible holding out."

It will be observed that the word "only" has been omitted from the latter act. Whether the legislature intended by the enactment of the above-cited requirements of section 2235, to require proof of the matters so required to be alleged, in addition to those specified in section 2245, above set forth, need not be decided upon this appeal in view of the conclusion reached respecting the validity of the petition. But, it is deemed proper to state in passing, that while title is not in issue, every fact which tends to establish the character or extent of the possession of the party complaining, is admissible. People v. Reed, 11 Wend. 157, 159; 8 Am. & Eng. Ency. of Law, pp. 167, 168, and citations; Muller v. Balke, 47 N. E. Repr. 355. Evidence of an adverse title, however, cannot be

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given, even to prove the extent of the defendant's possession. 8 Am. & Eng. Ency. of Law, 167.

Section 2235 was taken from sections 2, 3 and 29 of the above-cited provisions of the Revised Statutes, which the codifiers say were "consolidated and amended so as to correspond with the preceding section." They continue thus: "In other respects this section retains the essential language of the provisions, from which it has been compiled." Throop's Anno. Code, 1891, p. 357.

Sections 2 and 3 related to the complaint in proceedings for a forcible entry and detainer, and section 29 specified the facts to be set forth by affidavit in proceedings under article second.

Section 3, from which the language of the before-recited portion of section 2235 of the Code was substantially taken, prescribed: "Such complaint shall be in writing and shall be accompanied by an affidavit of such forcible entry or forcible holding out, and that the complainant has an estate of freehold or for term of years in the premises, then subsisting, or some other right to the possession thereof, *stating the same.*"

The revisers in their preliminary note relating to forcible entries and detainers in the Revised Statutes state, that the purpose of the revision of the acts from which they were taken, was "to present as clearly and distinctly as possible the substance and effect of our acts, as understood and practically executed in England and in this state." See Edm. Stat. at Large, pp. 492-494.

At the time of the adoption of said statutory provisions, it was essential to the validity of an indictment under the statutes, that the interest, of the party complaining, in the premises, be described with particularity. People v. Nelson, 13 Johns. 339, 343; Rex v. Griffith, 3 Salk. 169; Rex v. Blake, 3 Burr. 1732; Rex v. Wilson, 8 T. R. 358; 2 Burns' Justices of the Peace, p. 601; Dalton's Justice, chap. 130, p. 304; Chitty's Criminal Law (Am. ed., 1832), p. 1136; See Harding's case, 1 Greenl. (Me.) 26. It was otherwise, however, by the common-law rule, as unaffected by statutes, English or American. Rex v. Wilson, *supra;* State v. Pollok, 4 Ired. 305; 42 Am. Dec. 140; Bishop's New Crim. Law, § 501, p. 287.

It will be seen upon an examination of the above set forth provisions of section 3 of the Revised Statutes, that they were drawn in pursuance of the rule laid down in the decisions and text-books first above cited, which required the particular estate of the party complaining to be described in the indictment. These views

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find confirmation in the revisers' notes to section 11, *supra*, which state: "Sec. 9 to 11, same as §§ 8 to 10, R. S. original note to § 10. 'New,' § 12." Partially enacted in § 11, R. S., with the alterations suggested by the following note: *Original note.* "The first part of this section is an attempt to enact the decisions of the Supreme Court in 13 Johns. 340, and 11 id. 504, although the utility of the provision is questionable. Perhaps the policy of the act, would be better promoted, by declaring, instead of the provision in the text 'that the complainant shall not be required to show his right or title, but only that he was peaceably in possession of the premises at the time of the entry.' The residue is the same as the fourth section of the present act, substituting the word *interest*, or *estate*, so as to remove ambiguities."

As we have seen section 11, *supra*, related to the proof, while section 3 of the same article prescribed what the complaint shall contain.

The requirement that the estate of the party complaining be described with particularity in the preliminary papers contained in the before-recited provisions of the Revised Statutes (§ 3), and the Code (§ 2235), has been the subject of adjudication in a number of cases.

In People v. Reed, *supra*, Savage, Ch. J., said: "In the case of People v. Van Nostrand, 9 Wend. 50, it was intimated that, under the Revised Statutes, the nature of the estate need not be set forth in the indictment, and that possession alone was sufficient. For the sake of having the pleadings and proof agree, and that the court may see that the complainant is entitled to restitution, it is certainly proper to state the complainant's interest truly."

In People v. Field, 52 Barb. 198, Mullin, J., said (p. 209): "The legislature, in framing the statute in question, intended to require the party to disclose, in his complaint, the nature of his right to the possession, how and from whom it was acquired, so that it would appear that his right was a legal and valid one." And upon a subsequent appeal in the same case (58 Barb. 270), the court speaking through Potter, J., said (p. 273): "The third section of the statute, entitled 'Of forcible entries and detainers' (2 R. S. 508), requires that the complaint shall show that the complainant has some estate in the premises, then subsisting, or some other right to the possession thereof, stating the same. The relator alleged, as is seen, 'that he had a good and legal right and estate to said premises, and that he still has a legal right to the possession of said premises.' This is not stating the right, but the legal conclusion."

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The foregoing cases arose under the Revised Statutes, while the following were decided under the Code:

In Schneider v. Leizman, 57 Hun, 561, Dwight, P. J., said (p. 562): "The statute plainly requires a description of the particular title, estate or interest under which the petitioner claims."

In Fuchs v. Cohen, 19 N. Y. Supp. 36; 29 Abb. N. C. 56; 22 Civ. Pro. 269; 46 N. Y. St. Repr. 770, the petitioner alleged that she "is a tenant of the premises, pursuant to an agreement with the landlord." The court, through Pryor, J., after passing upon the sufficiency of the proof, said: "The statute requires that in forcible entry and detainer the applicant must present to the justice 'a written petition describing the premises and the interest therein of the petitioner' (Code, § 2235), which means 'a description of the particular title, estate, or interest under which the petitioner claims.' Schneider v. Leitzman, 11 N. Y. Supp. 434. Here the petition recites merely that the applicant 'is the tenant of the premises pursuant to an agreement with the landlord.' *Tenant simpliciter* is 'one who holds or possesses lands or tenements by a kind of title.' McAdam Landl. & Ten. 45. Whether the applicant was tenant for years, or from year to year, or from month to month, or at will, or at sufferance, is not indicated by the petition; wherein, therefore, 'is not a description of the interest of the petitioner, but, at most, an allegation that she had some interest which entitled her to the possession.' Schneider v. Leitzman, *supra*. An allegation of interest is not equivalent to a description of the interest. The complainant should disclose in his petition the nature of his right to the possession, and how and from whom it was acquired, and an allegation as to his rights, without facts to sustain it, is a legal conclusion. People v. Field, 52 Barb. 198. A technical objection suffices to defeat the proceeding. People v. Smith, 24 Barb. 16; People v. Whitney, 1 Thomps. & C. 533. The defect in the description of petitioner's interest in the premises deprived the court of jurisdiction." Schneider v. Leitzman, *supra*.

In Cahill v. Wyand, 22 Civ. Pro. 271, the petition failed to describe the interest of the petitioner in the premises, and Bischoff, J., said, in relation thereto (p. 273): "That the justice did not obtain jurisdiction because of the omission from the petition in the forcible entry and detainer proceedings, of a particular description of the petitioner's interests in the premises."

The case of New York City Baptist Mission Society v. Potter, 20 Misc. Rep. 191, cited by the respondent, is inapplicable to

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the question under consideration. There an injunction was applied for to restrain the prosecution of these proceedings in the court below, and Pryor, J., at Special Term, held that as there was a perfect defense and which was available in the court below, the application should be denied. Respecting the case of Fuchs v. Cohen, *supra*, the learned judge said (p. 194), that there "the question as to the validity of the petition arose upon appeal from a final order in the proceeding, and, hence is no authority for the proposition that an insufficient description of the petitioner's interest gives equity jurisdiction to enjoin the proceeding." The case of Campbell v. Mallory, 22 How. Pr. 183, while not directly in point upon the question under consideration, may nevertheless be cited by way of illustration. There the proceedings were brought under article second of the Revised Statutes, *supra*, to recover the possession of the following-described premises by reason of the expiration of the tenant's term therein, viz.: "A certain house and lot, situate in the village of Penn Yan, in the town of Milo, and county of Yates." Briggs, J., passing upon the sufficiency of the affidavit containing such description, said (p. 187): "This description is too general, and in my judgment does not meet the requirement of the statute. 24 Barb. 438. Looking at the design of the statute, I can see an obvious reason why the affidavit should describe the premises, for it is upon this that the magistrate predicates his jurisdiction and action, in issuing his summons under section 30."

The case of People v. Teed, 48 Barb. 424, cited by the respondent, has no application for the reason that it was a proceeding under article second, *supra*, to recover the possession of land for nonpayment of rent, and wherein it was merely decided, that the affidavit of the landlord need not state the date or duration of the lease, by virtue of which rent is claimed.

The views expressed by Mr. Justice Pryor in Fuchs v. Cohen, *supra*, are in accord with those of the text writers. Judge McAdam in his work on Landlord & Tenant (2d ed.), p. 717, says: "The mere allegation of the complainant's right of possession, without stating the right, is a mere legal conclusion, and the proceedings, upon motion, should be dismissed for the defect." Taylor holds that the complainant's interest must be truly stated. 2 Taylor Landl. & Ten., § 790, p. 403. Wood lays down the rule that the complainant's estate must be set forth. Wood Landl. & Ten., § 562, p. 975.

The case of Fuchs v. Cohen, *supra*, is, in my opinion, an adjudication bearing directly upon the point under consideration.

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Stripped of its verbiage, the description of the petitioner's interest in the premises is substantially the same as in the one before us. Moreover, the tenant appears to have pleaded to the merits, as herein. This case, to my mind, comes clearly within the principle of the decision referred to, and, therefore, upon principle and authority, it must be held, that by reason of a total absence of an allegation requisite to give jurisdiction, the court below never acquired any, and, hence, its acts in this proceeding were *coram non judice.*

It may be urged that no practical purpose is served by requiring the applicant in proceedings of this character to describe his interest in the land, to the possession of which he seeks to be restored, but in People v. Reed, *supra*, it was intimated that a mere intruder or trespasser, and in People v. Field, 1 Lans. 222, 247, it was held that a transferee of a licensee of the owner of the land, could not institute proceedings under the statute, and, hence, the necessity, and the wisdom, of the requirement. Besides, under the provisions contained in 1 R. S. 96, the remedy was restricted to cases where the party complaining was seized of a freehold or was possessed of a term for years. People v. Nelson, *supra;* People v. Van Nostrand, 9 Wend. 51, 52.

The learned author of Am. & Eng. Ency. of Law, Vol. 8, p. 152, adverting to the purpose of the rule requiring a description of the complainant's estate, says: "The object of this requirement would seem to be to show that the possession or right of possession of the complainant was legal and sufficient." Bishop in his New Criminal Law, Vol. 2, § 501, p. 287, commenting upon the same subject, says: "On principle we may not easily see how, under any of these statutes, the matter can be otherwise than that as at the common law, except, where the prosecutor proposes to ask for a judgment of restitution. Where he does so propose, clearly the indictment, on authority and perhaps on principle, must set out his title." And the purpose of this requirement is further illustrated by the following remark of Spencer, J., in People v. Nelson, *supra* (p. 343): "Tenants at will or sufferance, are not protected by the statute, and yet, if it were not essential to allege the estate to bring it within the reach of the statute, tenants of that description might avail themselves of the remedy afforded by the statute contrary to its plain intendment."

It may likewise be argued that the construction given to the above-cited provisions of section 2235 of the Code, is too strict, in

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view of the provisions of section 3345 of the Code, whereby it is declared that "the rule of the common law, that a statute in derogation of the common law is strictly construed, does not apply to this act." But it seems to me, that the latter enactment cannot be invoked for the purpose of nullifying settled rules of law.

It may be further claimed that the object of the legislature in enacting the above-recited provisions of the Code was to confer the remedy upon those having any right to the possession, and hence, one showing such right is entitled without further proof to the benefit of said enactment. True, but the law-making power having provided the remedy it has the right to prescribe the *mode* in which the same should be pursued, and as this was not followed here jurisdiction of the subject-matter was not acquired.

In Miller v. Brinkerhoff, 4 Den. 119, Bronson, Ch. J., said (p. 120): "When certain facts are to be proved to a court of special and limited jurisdiction, as a ground for issuing process, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise. * * * But when the proof has a legal tendency to make out a proper case, in all its parts, for issuing the process, then, although the proof may be slight and inconclusive, the process will be held valid, until it is set aside by a direct proceeding for that purpose. In one case, the court acts without authority; in the other, it only errs in judgment upon a question properly before it for adjudication. In one case, there is a defect of jurisdiction; in the other, there is only an error of judgment. Want of jurisdiction makes the act void; but a mistake concerning the just weight and importance of evidence, only makes the act erroneous, and it will stand until reversed."

The doctrine of this case has been applied in numerous cases, among which may be mentioned: Staples v. Fairchild, 3 N. Y. 41; People ex rel. Tweed v. Liscomb, 60 id. 559, 568; Roderigas v. East River Savings Institution, 63 id. 460, 464; Potter v. Ogden, 136 id. 384; Campbell v. Mallory, 22 How. Pr. 183, 188.

In Allison v. Snider Preserve Co., 20 Misc. Rep. 367, McAdam, J., said: "An appellate court may so far act upon the void determination as to reverse it with costs of the appeal, and thus restore the parties to the position they originally occupied (McMahon v. Reuhr, 47 N. Y. 67)."

If the view that the court below did not acquire jurisdiction of the subject-matter of this proceeding because of the failure to describe the interest of the applicant in the premises is well founded,

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then it follows that the defendants were not, as claimed, precluded from objecting to the jurisdiction of the court, because the motion to dismiss the proceedings was not made until after they had filed their answer.

It is a familiar principle, that when for any cause a court has no jurisdiction of the subject-matter in an action or proceeding, neither an appearance, consent of the parties, nor pleading to the merits and going to trial will give it jurisdiction. Dudley v. Mayhew, 3 N. Y. 9; Burkle v. Eckhart, id. 132; Campbell v. Mallory, *supra;* Wheelock v. Lee, 74 N. Y. 495; Davidsburgh v. Knickerbocker Life Ins. Co., 90 id. 526; Robinson v. Oceanic Steam Nav. Co., 112 id. 315; Grafton v. Brigham, 70 Hun, 131; Nazro v. Cragin, 3 Dill. 474; Person v. Fidelity & Casualty Co., 84 Fed. Repr. 759; Taliaferro v. Bassett, 3 Ala. 670; Winn v. Freele, 19 id. 171; Jeffries v. Harbin, 20 id. 387; Jacks v. Moore, 33 Ark. 31; Feileett v. Engler, 8 Cal. 77; Doctor v. Hartman, 74 Ind. 221; Smith v. Myers, 109 id. 9; Lindsey v. McClelland, 1 Bibb. 252; Chapman v. Morgan, 2 Greene, 374; Hurd v. Tombes, 7 How. (Miss.) 229; Gilliland v. Sellers, 2 Ohio St. 223; Agee v. Dement, 1 Humph. 332; Lawrence v. Wilcock, 11 Ad. & Ell. 941.

In Campbell v. Mallory, *supra*, an objection to the jurisdiction of the magistrate on the grounds hereafter mentioned was raised for the first time on appeal, and Briggs, J., said, in reference thereto (p. 189): "But it is still insisted, that though the affidavit was insufficient to confer jurisdiction, the magistrate acquired jurisdiction notwithstanding, by the appearance of the tenant before the magistrate, without taking this objection and litigating the matter upon the merits. Had the magistrate acquired jurisdiction of the subject-matter, so as to have authorized him to issue his summons under section 30, and had there been any defect in this process, or the manner of its service, yet the tenant appearing in obedience to its command, and not pointing out such defect by objection, I am of the opinion that he would be too late to raise an objection for the first time on appeal, and for this obvious reason, jurisdiction for the subject-matter having been acquired under the statute by virtue of the affidavit and of the person by appearance, no question, not raised before the magistrate, could be considered in this court. But it may be said, that the statute confers this jurisdiction. In a general sense the statute does confer upon the magistrate jurisdiction of proceedings of this character; yet after all, this jurisdiction must be taken and exercised in strict conformity to the statute, and in no

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other way can his acts be recognized as valid. The magistrate not having acquired jurisdiction of the subject-matter for the reasons stated, he could not take jurisdiction of any of its consequences or incidents (9 Johns. 239), nor could consent confer this jurisdiction (Coffin v. Tracey, 3 Cai. 129), though it will, of the person when jurisdiction of the subject-matter has been previously acquired."

In Davidsburgh v. Knickerbocker Life Ins. Co., *supra*, Danforth, J., said (p. 529): "In the present case the defendant did not take the objection by its answer, but at the end of the plaintiff's case. The point of time does not seem material. The court could not acquire jurisdiction by consent, and might, whenever its attention was called to the defect in the proceedings, refuse to exceed the powers conferred by the law of its creation. There are, no doubt, many cases where the court having jurisdiction over the subject-matter may proceed against a defendant who voluntarily submits to its decision, but where the state prescribes conditions under which a court may act, those conditions cannot be dispensed with by litigants, for in such a case the particular condition or status of the defendant is made a jurisdictional fact."

In Grafton v. Brigham, *supra*, the court, speaking through Barrett, J., held, that a magistrate in summary proceedings can acquire jurisdiction of the person by consent though not, of course, of the subject-matter, and cited Campbell v. Mallory, *supra*, in support of such proposition.

In Agee v. Dement, *supra*, it was held that where a court or justice has no jurisdiction of the subject-matter in dispute, such want of jurisdiction cannot be waived by appearance, plea, consent, or in any way whatever; and any judgment rendered in such case was void to all intents and purposes. In Person v. Fidelity & Casualty Co., *supra*, Hammond, J., said (p. 766): "If there had been no process at all, the appearance of the defendants would have been good, provided the suit had been well brought in the beginning; that is to say, brought by one having the right to bring such a cause of action, either for himself or for those who might be substituted for him. The original plaintiff had no such right, and it is for this reason that the suit is dismissed, and not because he defectively proceeded in his suit."

Numerous other cases might be cited in support of the proposition that objection to jurisdiction of the subject-matter may be raised at any time, and even for the first time on appeal, but as the

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doctrine is so firmly imbedded in our system of jurisprudence, further citation of authorities is deemed wholly unnecessary.

The respondent has called our attention to certain expressions employed by judges in People v. Reed, *supra;* and People v. Field, 52 Barb. 98, to the effect that the defendant must object to the sufficiency of the complaint before pleading to the merits, or else, will be deemed to have waived the objection. A careful scrutiny of the same, however, shows that they are followed in each instance by a statement that the defect adverted to was not of such a character as to deprive the magistrate of jurisdiction. They are, therefore, mere *obiter dicta.* But, it was expressly held in People ex rel. Davids v. Wilson, 13 How. Pr. 446, that it was not too late to move to quash the inquisition, after it had been traversed by the defendant. This case, as far as I have been able to discover, has not been overruled or distinguished. On the contrary, it was cited with approval in People v. Field, 52 Barb. 210; and People ex rel. Decker v. Whitney, 1 T. & C. 533, 536.

In McCarthy v. Noble, 5 Legal Obs. 380, there is a statement to the effect that "the appearance of the defendant before the justice in summary proceedings to recover the possession of land, is a waiver of any defect in the affidavit upon which the proceedings were founded." However, as the facts in relation thereto are not given, it is assumed that the defect was not fatal.

The cases cited by the respondent touching waiver of jurisdictional objections have no application for the reason that they relate solely to jurisdiction *in personam,* which, as seen, may be acquired by a tribunal having jurisdiction of the subject-matter by the general appearance of the defendant, or by his pleading to the merits. 12 Am. & Eng. Enc. of Law, p. 299 and citations. Such, however, is not the case here as the court below never acquired jurisdiction of the subject-matter, because the petition was wholly defective in the regard stated.

The only defect in a petition under said provisions, which, in my opinion, may be waived, is one pertaining to form and not substance. To hold otherwise would confer upon courts of limited jurisdiction powers not even possessed by courts of original jurisdiction, viz., to entertain jurisdiction of the subject-matter, in the absence of the constituent elements.

The applicant was allowed upon the trial, against the defendants' objection and exception, to amend the petition by alleging additional facts concerning his alleged interest in the premises. This, to my

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mind, could not be done, as the court had never acquired jurisdiction of the subject-matter.

As was said by McAdam, J., in Marchand v. Haber, 16 Misc. Rep. 319, 321: "A justice cannot, by amending a proceeding in a particular which is necessary to give him jurisdiction, acquire an authority *nunc pro tunc*."

There were other grounds urged for a reversal of the final order; but, in view of the conclusion reached that the court below never acquired jurisdiction of the proceedings, it will not be necessary to consider them.

For these reasons the final order should be reversed, with costs to the appellants.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Final order reversed, with costs to appellants.

JULIA ROSS, Respondent, *v.* THE NEW YORK CITY BAPTIST MISSION SOCIETY et al., Appellants.

(Supreme Court, Appellate Term, June, 1898.)

Summary proceedings — Forcible detainer — Petition — Jurisdiction.

An allegation contained in the petition of a person seeking to regain possession of premises from which, as she alleges, she has been forcibly dispossessed, that she is "a lessee of the premises * * * under an agreement made between her and the trustees of the said Tabernacle Baptist Church, by the terms of which your petitioner duly leased from the said Tabernacle Baptist Church the aforesaid premises, and by virtue of such agreement became entitled to and went into possession of said premises," is not a compliance with the provisions of section 2235 of the Code of Civil Procedure, which require such an applicant to present to the justice "a written petition * * * describing the premises * * * and the interest therein of the petitioner".

A District Court of the city of New York acquires no jurisdiction of the subject-matter under such a petition and the defect is neither waived nor cured by the fact that the defendants plead to the merits before they objected to the jurisdiction of the court.

APPEAL by the defendants from a final order in summary proceedings awarding the delivery of the possession of certain premises

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to the petitioner, made by the justice of the District Court in the city of New York, for the fourth judicial district, upon a trial had without a jury.

These proceedings were instituted to regain the possession of the premises known as No. 162 Second avenue in the city of New York, and also known as the Church House of the Tabernacle Baptist Church, claimed to have been forcibly entered upon by the defendants, and who, it is further claimed, forcibly held the same.

The other material facts are stated in the opinion.

John E. Parsons, for appellants.

Benjamin Scharps, for respondent.

GIEGERICH, J. In view of the conclusion reached in Potter v. New York City Baptist Mission Society, ante p. 671, it is manifest that the allegations of the petition herein touching the interest of the applicant in the premises were wholly insufficient to confer jurisdiction of the subject-matter.

The averment contained in the petition that the applicant is "a lessee of the premises * * * under an agreement made between her and the trustees of the said Tabernacle Baptist Church by the terms of which agreement your petitioner duly leased from the said Tabernacle Baptist Church the aforesaid premises, and by virtue of such agreement became entitled to and went into the possession of said premises" is not a compliance with the provisions of section 2235 of the Code of Civil Procedure which require the applicant to present to the justice "a written petition * * * describing the premises * * * and the interest therein of the petitioner."

As was said by Pryor, J., in Fuchs v. Cohen, 19 N. Y. Supp. 236, "whether the applicant was tenant for years or from year to year, or from month to month, or at will, or at sufferance, is not indicated by the petition; wherein, therefore, 'is not a description of the interest of the petitioner, but, at most, an allegation that she had some interest which entitled her to the possession.' Schneider v. Leitzman, 11 N. Y. Supp. 434. An allegation is not equivalent to a description of the interest."

The respondent insists that notwithstanding such defect, the court below acquired jurisdiction by reason of the general appearance of the defendants, and their pleading to the merits, before raising

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the objection to the jurisdiction of the court. Had the court below acquired jurisdiction of the subject-matter, there might be some force to this contention, but, as it had not, the objection was not waived, and the defendants were not precluded from raising it. Potter v. N. Y. City Baptist Mission Society, *supra*.

For these reasons the final order should be reversed, with costs to the appellants.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Final order reversed, with costs to appellants.

HANNAH FREUND, Appellant, *v.* LUCILLE C. KEARNEY, as Executrix and Trustee, Etc., of JANE H. MILLS, Deceased, Respondent.

(Supreme Court, Appellate Term, June, 1898.)

Lease — Indefinite description of premises — Parol evidence.

Where an owner leases the "westerly half" of a store of irregular shape, which widens as it deepens, and contains in its rear an intermediate or mezzanine floor, making there a ground floor and a gallery space, parol evidence may be given by the tenant, in proceedings taken to dispossess her, tending to show what parts of the store were, at the time when the lease was made, assigned to each party, as such testimony does not tend to vary or contradict the lease, but is, in view of the indefiniteness of the description, competent as showing the practical construction given to the lease by the acts and admissions of the parties.

THIS is an appeal by the petitioner from a final order of the Municipal Court of the City of New York, borough of Manhattan, sixth district, made in favor of the occupant, Jane H. Mills, by the justice thereof, upon a trial had without a jury.

The said Jane H. Mills died shortly after the making of the final order, and by an order of this court, Lucille C. Kearney, executrix and trustee of the last will and testament of said Jane H. Mills, deceased, was substituted in her place and stead as respondent herein.

The nature of the proceedings and the material facts are stated in the opinion.

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Walter D. Edmonds, for appellant.

George W. Sickels, for respondent.

GIEGERICH, J. These proceedings were brought to remove the respondent's testatrix, Jane H. Mills, from a certain portion of the store in the building known as number 68 West Twenty-third street, in the city of New York, into which, it is alleged, she intruded and squatted upon, without the permission of the applicant.

The answer of said respondent's testatrix was a general denial, and alleged that she went into the possession of the premises on March 1st, 1895, under a lease made by the appellant to her.

The appellant during the times hereafter mentioned, was the lessee of the entire store, above referred to, in part of which she carried on a corset and fancy-goods business, and by a written lease bearing date the 31st day of January, 1895, she underlet the "westerly half" of such store to the respondent's testatrix for the term of four years and two months, from March 1, 1895, as a millinery establishment. According to the map of the survey and the undisputed testimony of the surveyor the store is only about nine feet wide at the front of the westerly entrance and continues at that width for about thirteen feet. It then widens out by reason of a jog on the easterly side of about eight feet, but half of this space is taken up by a stairway leading to the basement. After the entrance to the latter is passed it is about seventeen feet wide and continues at this width to within about thirty-six feet of the rear wall, at which point it again widens out about two feet, thus making the width of this part of the store about nineteen feet. Within the space last referred to and about thirty feet from the southerly wall, the store has been divided into an upper and lower part by a horizontal mezzanine floor, thus creating a gallery and subgallery of equal dimensions, each room or apartment being eight feet in height in the clear. The controversy here arises with respect to the easterly half of the lower room or subgallery.

On the trial, the respondent's testatrix was permitted to give testimony to the effect that during the negotiations preceding the execution of the lease which took place on January 31st, 1895, the appellant and herself made an examination of the store where the former pointed out the part each was to occupy, it being understood between the parties that the room under the gallery was included in that portion of the store sought to be leased, viz., the westerly por-

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tion, and that the appellant was to occupy the gallery, access to which is gained by a staircase on the easterly side; that in pursuance of such understanding the respondent's testatrix took possession of the lower room, and the appellant occupied the gallery.

The respondent's testatrix was further permitted to show by the testimony of one Malcolm G. Broadbent, that while negotiations were pending between said parties litigant, the appellant stated that she did not wish to have said room below the gallery painted, because she expected to let it to the respondent's testatrix.

All of the foregoing testimony was received under the appellant's objection and exception.

The appellant insists that the premises so leased by her to the respondent's testatrix are described in the lease with sufficient certainty to locate the same without resorting to oral evidence; but, to my mind, such description is of the most vague and indefinite character; the lease setting forth no monuments to indicate the dividing line between the part of the store leased to the respondent's testator, and the remaining portion retained by the appellant, and not intended to be included in the demise.

It is further urged by the appellant that the store is capable of an equal division by drawing a line through the middle of the different widths of the same, and that by applying this method the large show-window will be in the easterly or petitioner's half of the store. An examination of the surveyor's map, however, shows the fallacy of the contention. At the westerly corner of the building facing the street is a show-window two feet wide and nine feet six inches deep, and adjoining the same, in an easterly direction, is an entrance two feet and six and one-half inches wide. East of the latter is a show-window having a width of seven feet and one inch in front, and four feet and eight inches in the rear, and a depth of nine feet and six inches. Under these circumstances I fail to perceive the appellant's right to the whole of the easterly show-window.

The map put in evidence contains a line drawn through the center of the store and running from north to south. According to such map the large show-window, excepting two feet and five inches thereof fronting the street, is to the west of the middle line, while the gallery, which extends across the full width of the store, is so arranged that access to it can be gained only by using a staircase which is wholly within the easterly portion of the store.

The application of the middle line therefore, in either instance, signally fails to definitely locate the part of the store which the ap-

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pellant intended to lease to the respondent's testatrix, and did lease by the designation the "westerly half" of the store in question; and hence in view of such ambiguity oral evidence was admissible not to contradict or vary the lease, but to identify the part of the store demised, and show the appellant's intention. Pettit v. Shepard, 32 N. Y. 97, 104.

The general rule pertaining to the question under consideration is well stated by Haight, J., in Harris v. Oakley, 130 N. Y. 5, as follows: "Where, in the description of premises in a deed, courses, distances and monuments are given, the premises must be located according to the deed, and all parol evidence of the declarations and acts of the parties of an intended different location is inadmisssible as contradicting or varying the deed. But there is another rule to which we must call attention, and that is, that where the description contained in the deed is so vague, obscure or conflicting as to leave the intent of the parties uncertain, the declarations and acts of the parties may be shown by parol."

These rules are frequently applied in the construction of deeds where the land is vaguely described. Thus oral evidence was admitted to show what was intended by the "west half of lot 76," in a township (Pettit v. Shepard, *supra*); and by the following descriptions or designations: "at or near a tree" (Stewart v. Patrick, 68 N. Y. 450); "Pelican Beach" (Coleman v. Manhattan B. I. Co., 94 id. 229); "fractional lot, whereon John Smith now lives, No. 181" (Summerlin v. Hesterly, 20 Ga. 689; S. C., 65 Am. Dec. 639); "south half of a certain quarter section" (Prentiss v. Brewer, 17 Wis. 635; S. C., 86 Am. Dec. 730); "parts of certain lots" (Shore v. Miller, 80 Ga. 93; S. C., 12 Am. St. Rep. 239); "one acre from the southwest corner of the southwest quarter of the southwest quarter of section 9, together with the buildings thereon" (Lego v. Medley, 79 Wis. 211; S. C., 24 Am. St. Rep. 706); "south fractional half of fractional section twenty-nine" (Swayne v. Vance, 28 Ark. 282); "one acre and a half in the northwest corner of section five, together with the brewery," etc. (Bybee v. Hageman, 66 Ill. 519); "one-third of a league of land known as survey No. 280, on David's creek, a branch of the Colorado river, about one mile from the mouth of said river, and about twelve miles from the mouth of the Concho, described in letters-patent, dated the 15th day of October, A. D., 1851," (Giddings v. Lea, 19 S. W. Repr. 682); "southeast quarter of section number fourteen (14)" in a township (Eckford v. Eckford, 26 L. R. R. 370).

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In Lanman v. Crooker, 97 Ind. 163; S. C., 49 Am. Rep. 437, a mortgage was executed upon land, excepting "twenty acres from the northeast corner of said above-described tract of land, formerly deeded to Wm. Davis and Emeline M. Davis." In an action to recover the said twenty acres it was held, that oral evidence was admissible to show that the twenty acres intended to be excepted was not in the northeast corner, but off the south end.

In Thompson v. Jones, 4 Wis. 106, the deed described the premises as in the northwest quarter section, and oral evidence was admitted for the purpose of showing that the southeast quarter section was intended.

In Davidson v. Shuler, 119 N. C. 582; 26 S. E. Repr. 340, oral evidence was admitted to locate a tree called for by a grant as the beginning corner, at the northeast corner of the lot referred to in the grant, instead of the southeast corner described therein.

In Orvis v. Elmira, Cortland & A. R. R. Co., 17 App. Div. 187, it was said by Putnam, J. (p. 190): "That when words of general description are used in a deed oral evidence may be resorted to to locate the premises conveyed."

In the light of these authorities it is manifest that the foregoing testimony regarding the construction given by the parties to the lease under consideration, as shown by their acts and admissions, was rightly admitted. The testimony so received was contradicted by the appellant, and there was sufficient evidence in the proceeding to support a finding either way. The justice decided in favor of the respondent's testatrix, but we should not disturb his decision in the absence of the elements which are requisite to a review of the facts. He had the advantage which we do not enjoy of observing the witnesses while on the stand and the manner in which they gave their testimony, and hence was in a better position than we are of judging as to their credibility. Berman v. Goldsand, 22 Misc. Rep. 735.

It follows from these views that the final order should be affirmed, with costs.

GILDERSLEEVE, J., concurs.

BEEKMAN, P. J. (concurring). I concur in the conclusion to which Mr. Justice Giegerich has come, that the final order made by the court below should be affirmed. After a careful examination of the evidence in the case, I think that the proofs are sufficient to

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justify a conclusion that there was a practical location of the demised premises between the parties, which is sufficient to sustain the division of the store between the two to which the respondent has testified. The peculiar manner in which the store was arranged at the time that the lease in question was entered into should be considered in determining from the lease itself what was meant by the parties when they described the premises to be leased as the "westerly half" of premises that were not actually divided by any visible boundaries in that manner. The departure, then, in a single detail from a general easterly and westerly division of the premises is not necessarily inconsistent with the general description which the lease gives of a westerly half. Conceding the claim of the respondent to the whole of the floor in the rear under the gallery, the description of the premises as the westerly half of the whole store would still be not inapt as a general designation of what had been demised. I do not think, therefore, that the inclusion of the premises in dispute in respondent's lease is so inconsistent with the terms of the lease itself as to bring the case within the rule which forbids the modification or variation of the terms of a written instrument by parol. There was sufficient ambiguity in the lease disclosed by the actual situation of the store to justify a resort to parol evidence to explain the meaning and intention of the parties. The contention of the respondent, it seems to me, is also supported by the probabilities of the case. The only access to the gallery was by the staircase situated wholly upon the easterly half of the premises, while the entire space under the gallery could only be reached by going upon the westerly half. It was, therefore, most natural, and, I think, also equitable, that the division to which the respondent has testified should have been made. It is true that the appellant denies that there was any such practical location or division agreed upon, but it also appears beyond dispute that during the period of the occupation of the demised premises by the respondent — a period of about three years — she has actually occupied and used the portion of the store, in dispute and that the appellant during the same time has had the exclusive use of the whole of the upper floor of the gallery. There was, therefore, quite enough in the case to justify the court below in finding the facts in favor of the respondent, and under repeated decisions of this court, a conclusion thus reached will not be disturbed.

Final order affirmed, with costs.

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SARAH G. PEARSE, Respondent, *v.* PATRICK DIVVER, Appellant.

(Supreme Court, Appellate Term, June, 1898.)

Entire contract — Performance.

An accepted proposal to paint a cottage, barn, windmill, chicken-house and all other painting on the outside of a residence, and to do certain other interior painting for a gross sum stated, is an entire contract, and where the contractor has failed to perform in certain essential particulars, his assignee can recover nothing against the owner of the property.

APPEAL by the defendant from a judgment of the District Court in the City of New York for the thirteenth judicial district, rendered in favor of the plaintiff for $50 damages, with costs and extra costs, by the justice thereof without a jury.

The nature of the action and the material facts are stated in the opinion.

James P. Niemann, for appellant.

Charles A. Winter, for respondent.

GIEGERICH, J. The plaintiff's complaint is predicated upon two causes of action, one, to recover a balance of $92, claimed to be due on a contract made between the plaintiff's assignor and the defendant, and the other for $18 for extra work.

The answer denies performance of the contract; avers that the work was done in an improper and unworkmanlike manner; alleges that the so-called extra work formed part of the work required to be performed by the contract made between plaintiff's assignor and the defendant; and sets up a counterclaim for $150 damages, claimed to have been sustained in consequence of the alleged breach of plaintiff's assignor. Another counterclaim is set up, which it is not necessary to consider, in view of the conclusion reached respecting other issues presented by the pleadings.

In or about the month of May, 1897, the plaintiff's assignor submitted to the defendant the following estimate:

"*May* 10, 1897.

MR. PATRICK DIVVER:

DEAR SIR.— Propose to paint your cottage and barn, windmill, chicken-house and all other painting on outside at your Cedar-

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hurst residence. And paint your kitchen walls and kalsomine kitchen ceiling and entrance ceiling and one attic-room and two 2nd story rooms and back stairway walls. And varnish ceiling and sides of wagon-room in the barn.

For the sum of One Hundred and Ninety Five Dollars and Seven 50/100 dollars added for the varnish, total $202.50/100.

Yours truly,

W. S. PEARSE,

Far Rockaway."

The defendant testified that he unconditionally accepted the above proposal, while the plaintiff's assignor, on the other hand, testified that before entering upon the performance of the contract, the defendant waived the varnishing of the interior of the carriage-house, and the painting of a grape arbor, and that, with these exceptions, the paper writing above set forth was the final contract between the parties.

At the trial the plaintiff's assignor, while claiming to have performed the contract, admitted his failure to paint the first story of the house, the end of the barn, chicken-house, and grape arbor, and to varnish "the wagon-room and blinds and boards on the back of the chicken-house, where the duck pond is."

The testimony adduced on behalf of the defendant tended to show a failure to perform the contract in substantial and important respects, and such work as was done was finished in an improper and unworkmanlike manner.

When both sides rested, the justice said:

"It seems to me it is shown by the evidence that this work was not done in proper manner. The only thing is that there has been some work done that ought to be paid for.

"The extra work I will allow, that is $18.50, and as to the other work — I did not hear any criticism of the work on the windmill or the chicken-house. I think I ought to allow something more than was paid, but not a great deal; I will allow something like $49.50 to the plaintiff.

"Counsel for plaintiff.— Will your honor make it $50, as this has been an expensive proceeding, and one in which we ought to have costs?

"The Court.— Judgment for the plaintiff for $50 'and costs.'"

It requires no citation of authorities to show, that the plaintiff, under these circumstances, cannot recover.

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The justice having found that the contract, which was in its nature entire, in my opinion, had not been substantially performed in its important and essential elements, could not lawfully allow any recovery thereon.

For these reasons the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

LOUIS PFAU, Respondent, *v.* JEROME ALTERIA, Impleaded, etc., Appellant.

(Supreme Court, Appellate Term, June, 1898.)

Negligence — Nonsuit — Opinion of lay witness.

Where the defendant has failed to make the contributory negligence of the plaintiff a ground for the dismissal of the complaint in an action based upon negligence, and this defect might have been supplied by the plaintiff had his attention been called to it on the trial, the court will refuse to consider the objection when made for the first time on appeal.

Upon the trial of such an action, it appeared that the plaintiff, a bricklayer who had just been discharged from further work upon a building, was injured by a brick which fell from a scaffold. He was permitted to testify, under objection, among other things, "But I tell you, your honor, my head will never be the same".

Held, that as the witness was not an expert, he was incompetent to express such an opinion.

APPEAL by the defendant Jerome Alteria, from a judgment of the Municipal Court of the city of New York, borough of Manhattan, sixth district, rendered in favor of the plaintiff against the defendants, by the justice thereof, without a jury.

Action to recover damages for a personal injury claimed to have been sustained in consequence of the defendants' negligence. The pleadings were oral. The answer was a general denial. The opinion states the material facts.

Edward V. Thornall, for appellant.

Sidney J. Cowen, for respondent.

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GIEGERICH, J. The respondent was injured by a portion of a brick which fell from a scaffold in front of a building, in the course of erection, while standing on the sidewalk from three to five feet from the east end of the building.

He had been employed upon such building as a bricklayer for three weeks prior to the accident. His services had been dispensed with about an hour previously and he was waiting for his pay.

A reversal of the judgment is sought on the ground, among others, that the respondent was guilty of contributory negligence. No such ground, however, was urged in the court below. There the only reason assigned for a dismissal of the complaint was that the negligence of the appellant had not been shown.

In Quinlan v. Welch, 141 N. Y. 158, 165, the court applied the rule, that a motion for a nonsuit is ineffectual unless the grounds upon which it is based are specified. There the defendant moved for a nonsuit upon two grounds, and upon appeal sought to add another. At a subsequent term of the same court, it was held in Gerding v. Haskin, 141 N. Y. 514, 520, that "where no grounds are specified for a nonsuit, the motion is sufficient if it be apparent that the objection made to the plaintiff's recovery could not have been obviated if it had been particularly specified." As we are not satisfied, however, that the alleged defect in plaintiff's case could not have been supplied had his attention been specifically called thereto, it must be held, that the said ground for dismissing the complaint cannot in any event be considered upon this appeal.

On the trial the plaintiff testified: "But I tell you, your honor, my head will never be the same as it was."

Objection was made to this portion of the testimony, and a motion made to strike it out upon the ground that the respondent was not an expert as to his injuries. The motion was denied and the appellant noted an exception.

We think such ruling was erroneous for the reason that the witness was not an expert and, therefore, was not competent to give an opinion upon this question. O'Connell v. Beecher, 21 App. Div. 298.

For this reason the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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AGNES K. M. MULLIGAN, Appellant, *v.* JOHN J. COX, Respondent.

(Supreme Court, Appellate Term, June, 1898.)

A tenant may show that his landlord's title has been defeated — Former adjudication.

A tenant cannot dispute the title of his landlord, but may show that that title has been defeated by some event which happened after the making of the lease.

Where, however, a prior final order has been made in summary proceedings which, in effect, overruled the tenant's contention, then made, that his landlord's title, under a life tenant who had died, had passed to certain reversioners, the order is an adjudication that the relation of landlord and tenant still continues, and the tenant who, by payment, has stayed the issue of a warrant under the order, is precluded from renewing his contention, in a somewhat different form, in a subsequent proceeding taken by the landlord to dispossess him for nonpayment of the rent.

APPEAL from a judgment rendered in the District Court of the city of New York for the tenth judicial district, on the 31st day of December, 1897, in favor of the respondent, dismissing the proceedings.

Charles W. Coleman, for appellant.

Maurice Meyer, for respondent.

Per Curiam. This proceeding was instituted to recover the possession of the demised premises by reason of the nonpayment of rent claimed to be due on the 1st day of December, 1897, under a lease which is set forth in the petition. The tenant interposed an answer in which he denied the allegations of the petition, and set up a further defense tending to show that one Charles Barson, Sr., died on the 2d day of October, 1897, and that upon his death all the right, title and interest of the landlord above-named thereupon came to an end, and that since the decease of said Barson the said landlord ceased to have any right, title or interest in the property or the possession of the same, and that he, the said tenant, was then and had been since the decease of said Barson in possession of the premises

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under the consent, permission and license of certain persons whom he mentions, and who, he declares, became entitled to the possession of the property as reversioners upon the death of Barson. The facts leading up to this conclusion are set forth in the answer. Without here stating them at length, it is sufficient to say that the interest of the landlord was itself a leasehold one, derived from Barson, who was a life-tenant of the property, and consequently ceased upon his death, when the possessory right to the property free from demise passed to those who were entitled to the fee.

Although a tenant may not dispute the title of his landlord, this doctrine does not prevent him from showing that such title has been defeated by some event happening after the making of the lease. This is well settled (Jackson v. Rowland, 6 Wend. 666, 670; Despard v. Walbridge, 15 N. Y. 377; Hoag v. Hoag, 35 id. 469; Hetzel v. Barber, 69 id. 1), and is not the subject of dispute here, the contention of the landlord being that the tenant is precluded from availing himself of the defense by reason of a prior final order recovered against him in similar proceedings brought upon the same lease at a time when such defense could have been interposed. It appears from the proofs that on the 14th day of October, 1897, summary proceedings were instituted by the landlord against the tenant for the recovery of the premises in question on the ground that the latter was holding over after a default in the payment of one month's rent which became due under the lease on October 1st. The petition was in the usual form. An answer was interposed by the tenant, in which, among other things, he set up that the lease had terminated by reason of Barson's death, predicating his claim, however, upon a somewhat different theory from that presented by the defense in the proceeding now before us. A trial was had, which on the 21st day of October, 1897, resulted in a final order in favor of the landlord, awarding to him the delivery of the premises. The issuing of a warrant, however, was stayed by the payment of the rent, and the order in question, while it still stood, did not have the effect of annulling the lease. § 2253, Code of Civil Procedure.

It has been held in the case of Reich v. Cochran, 151 N. Y. 122, that the determination in such a proceeding comprehends and involves "every question relating to the validity of the lease and the relation between the parties, and the estoppel of the judgment extends to them even though they were not litigated or considered in that proceeding." The effect, then, of the final order of October 21, 1897, was to establish a subsisting relation of landlord and tenant

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between those parties, notwithstanding the existence of facts tending to negative such a conclusion, and the tenant cannot now be permitted to assume a position which is inconsistent with that adjudication. He might have pleaded such facts in that proceeding, but did not; it is too late to do so now where the effect would be to contradict what has been finally adjudicated.

The justice below, in dismissing this proceeding, rested his decision on the ground that the tenant could not have raised the defense in question in the former proceeding, because the rent for the nonpayment of which it was brought was actually due under the lease, and he quotes in support of this view the case of Gugel v. Isaacs, 21 App. Div. 503. That case, however, in no way supports his contention. There the suit was not to recover the property, but for rent which was payable in advance, and all the court held was that a subsequent eviction before the expiration of the quarter for which the rent was payable was no defense. It does not follow that because rent is due the landlord necessarily has a right to recover possession for its nonpayment. For if after the rent becomes due his reversionary interest ceases, he cannot recover the premises, although he may recover the rent. The facts of the case last cited afford an apt illustration of this proposition.

The adjudication in the former proceedings, then, conclusively established the continuance of the relation of landlord and tenant between the parties, and as no change of conditions since it was rendered is shown, it follows that the landlord was entitled to a final order in his favor, and it was, therefore, error to dismiss the proceedings.

Judgment reversed and a new trial ordered, with costs to the appellant to abide the event.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

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HUGO METZGER, Appellant, *v.* CHARLES SCHNABEL, Respondent.

(Supreme Court, Appellate Term, June, 1898.)

Innkeepers — When a person is a guest and not a boarder — Liability for unexplained loss of apparel.

A foreign army officer, who takes a room in a hotel for an indefinite time at an agreed price of one dollar and twenty-five cents per week, is a guest and not a boarder, and the hotel-keeper is liable to him for the value of wearing apparel which disappeared from his room, in some unexplained manner, and without any negligence upon his part.

APPEAL from a judgment of the Municipal Court of the City of New York, borough of Manhattan, seventh district, rendered by the justice, without a jury, in favor of the defendant.

Louis Scheuer, for appellant.

Wasserman & Jacobus, for respondent.

Per Curiam. The plaintiff brought this action to recover the value of some wearing apparel, which disappeared, during the absence of the plaintiff, and without any negligence on his part, in a manner unexplained, from a room in the defendant's hotel, which the plaintiff rented of defendant. At the conclusion of the defendant's testimony, the trial justice dismissed the complaint. The pleadings are in writing, and the allegation in the complaint that the premises, in which the plaintiff rented the room, is a duly licensed hotel or inn, is not denied by the answer. Furthermore, the witnesses called by the defendant state that the place in question kept by the defendant, is a hotel. The exact relation of the parties is not clearly defined by the testimony. It would seem that the justice, having dismissed the complaint, found that the relationship of innkeeper and guest was not established; for, if that were the true relationship of the parties, under the circumstances of this case, as disclosed by the evidence, the defendant is liable for the loss that the plaintiff sustained. From a careful examination of the entire testimony we are unable to discover any testimony to support this conclusion. As we have

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already seen, the character of the defendant's establishment is conceded to be a hotel. It also appears that plaintiff rented a room there, which was cared for by the defendant, and that there were two keys to the room, one carried by the plaintiff, the other kept by the defendant. It does not appear that the plaintiff bargained to remain for any particular time; although it is true that the agreed price of the room was to be $1.25 per week. But a special agreement fixing in advance the price to be paid, or the length of the stay, does not absolutely disturb the relation of innkeeper and guest, and constitute the person so acting a boarder or lodger. 11 Am. & Eng. Ency. Law, pp. 12, 15. A guest has been defined to be one who "comes without any bargain for time, remains without one, and may go when he pleases, paying only for the actual entertainment which he receives; and it is not enough to make him a boarder, and not a guest, that he has stayed a long time in the inn in this way." Shoecraft v. Bailey, 25 Iowa, 553; citing 2 Parsons on Cont. 162; Story on Bailments, § 447. But the more recent decisions of this state hold that the fixing of the price does not make the party a boarder. Hancock v. Rand, 94 N. Y. 8. A boarder has been defined to be one who "has food or diet and lodging in another's family for reward." 2 Am. & Eng. Ency. Law, p. 437. A lodger is one who "inhabits a portion of a house of which another has the general possession and custody." 13 Am. & Eng. Ency. Law, p. 1003.

We do not think the testimony will warrant the conclusion that there was an arrangement between the parties, which constituted an explicit contract that deprived the plaintiff of the privileges and rights of a guest. It is uncontradicted that the plaintiff is an officer in the German army, and, although his employment in this city, at the time of the loss, would indicate that he had taken up his residence here, it does not overcome his direct testimony that he was an officer in the German army and a wayfarer here.

The common law holds the innkeeper absolutely liable for all thefts from within or unexplained losses of property in his charge, belonging to his guest; although he may be discharged from liability by any contributory negligence of the guest. 11 Am. & Eng. Ency. Law, pp. 51, 53. In this case, as we have seen, there is no question of any contributory negligence, nor has the defendant furnished any explanation of the loss. In the case of Mowers v. Fethers, 61 N. Y. 37, our court of last resort held that "The duties,

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rights and responsibilities of an innkeeper are in most respects kindred to those of a common carrier, but in order to enforce the strict common-law liability of an innkeeper, the technical relation of guest and innkeeper must be established." The duty of a boarding-house keeper or lodging-house keeper to his boarder or lodger is to take the same care of his boarder's or lodger's property that a prudent person takes of his own; and the trial justice has presumably adopted the view that this relationship existed between the parties; that the defendant has shown that he took the care required of plaintiff's property, and that the defendant was, consequently, not liable for the loss. We do not concur in this conclusion. We are of opinion that the relationship of innkeeper and guest existed between the parties. The case of Hancock v. Rand, *supra*, supports the appellant's case and is applicable to the facts here presented.

We are of opinion that the conclusion reached by the trial justice is wholly unwarranted by the evidence, and that the judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

JOSEPH ADOLPH, Respondent, *v.* NATHAN KLEIN, Appellant.

(Supreme Court, Appellate Term, June, 1898.)

Appellate Term — Orders not reviewable — Remedy under Code C. P., § 3057.

The Appellate Term has no jurisdiction to entertain appeals from two orders, one made by a municipal court of the city of New York vacating a judgment against a defendant in that court, who had neither been served with the summons nor appeared voluntarily, and another order of the same court vacating the first order and denying the original motion.

Semble, that the defendant might have been relieved by an appeal from the judgment, taken under section 3057 of the Code of Civil Procedure.

APPEAL from two orders bearing date, respectively, March 22, 1898, and March 29, 1898, made by the justice sitting in the Mu-

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nicipal Court of the City of New York, borough of Manhattan, fifth district.

Rudolph Marks, for appellant.

Joseph J. Harris, for respondent.

Per Curiam. The order of March 22, 1898, vacating a judgment which had been obtained against the defendant, was granted on the ground that there had been no service of a summons nor a voluntary appearance by the defendant in the action. The second order, dated March 29, 1898, was made on a motion for the resettlement of the first order, upon which, after hearing further argument, the justice determined that his former order was erroneous, vacated the same accordingly, and denied the original motion. Without expressing any opinion with respect to the propriety of either order, it is sufficient to say that neither is appealable to this court. Appeals from determinations of the Municipal Court to the Supreme Court are limited to judgments and to such orders as are in terms made appealable under some specific statutory provision. We have been unable to discover any such provision which will support this appeal. Chapter 748 of the Laws of 1896 sanctions appeals in the cases there referred to only where an order opens a default or grants a new trial for the grounds stated in section 999 of the Code of Civil Procedure. Neither of the orders in question comes within either description. Possibly the defendant might have obtained relief by an appeal from the judgment under section 3057 of the Code of Civil Procedure, although it has been intimated that this section does not apply to the District Courts, now the Municipal Court of the City of New York. Jourdan v. Healey, 46 N. Y. St. Repr. 198. The court there, however, seems to have overlooked the provisions of section 3213 of the Code of Civil Procedure, which sanctions an appeal from a judgment rendered in a District Court of the city of New York "in the cases and in the manner prescribed in articles first and second of title eight of chapter nineteen" of such Code, which include section 3057 above referred to. As we have no jurisdiction to entertain this appeal, it must be dismissed.

Present: Beekman, P. J., Gildersleeve and Giegerich, JJ.

Appeal dismissed, with $10 costs.

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LOUIS WEINSTEIN, Respondent, *v.* LOUIS FLAXMAN, Appellant.

(Supreme Court, Appellate Term, June, 1898.)

Municipal courts of New York city — Order opening a default — Amendment.

An order of a justice of a municipal court of the city of New York, opening the plaintiff's default, must state the grounds of the order (Laws of 1896, chap. 748), but, although it fails to do so, where the return of the justice states the grounds and he further certifies that the defendant's attorney prepared and submitted the order, the Appellate Term will not reverse it, but will permit it to be amended by inserting the statement made by the justice as to the grounds upon which he proceeded.

APPEAL from an order of the Municipal Court of the city of New York, borough of Manhattan, fourth district, opening plaintiff's default.

Abraham B. Schleimer, for appellant.

Joel Krone, for respondent.

Per Curiam. This appeal is taken from an order made by the justice below opening the plaintiff's default incurred by reason of his failure to proceed with the trial. The justice considered that the default was sufficiently excused, and we see no reason for disturbing his conclusion in that regard. It appears, however, that he has failed to recite in the order the grounds upon which it was made, and he is required to do by chapter 748 of the Laws of 1896. This would ordinarily call for a reversal. Colwell v. Devlin, 20 Misc. Rep. 355. The justice, however, in making his return fully sets forth such grounds, and further certifies that the order in question was prepared and submitted to him for signature by the attorney for the defendant, who now appeals from the same. The indorsement upon the back of the order also shows that it was prepared and submitted by him. This was a somewhat extraordinary proceeding, and might well be regarded as a waiver of the objection which has been made. But without regard to that, we think we have the power and have concluded to modify the order by the insertion of a

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recital embodying the statement made by the justice below of the grounds upon which he proceeded.

Order modified as above stated, and as so modified affirmed, without costs.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Order modified, and as modified affirmed, without costs.

JOSEPH PORGES, Respondent, *v.* CHARLES COHEN, Appellant.

(Supreme Court, Appellate Term, June, 1898.)

1. **Replevin — Former adjudication.**

A dismissal of an action of replevin, "for a failure to place on calendar," is not "a final judgment" within the meaning of section 1691 of the Code of Civil Procedure and does not bar a second action of replevin for the same cause of action.

2. **Same — Demand, where possession is rightful.**

Where possession of chattels has been obtained rightfully, a demand, before action brought, must be alleged and proved, and a failure in this regard justifies a reversal of the judgment.

APPEAL from a judgment rendered in favor of the plaintiff in the Municipal Court of the city of New York, borough of Manhattan, fifth district, in an action of replevin.

Moses Feltenstein, for appellant.

R. Nathan, for respondent.

Per Curiam. The order or direction of the justice dismissing the former action instituted to recover the chattels in question "for failure to place on calendar," was not a final judgment in that action within the meaning of section 1691 of the Code of Civil Procedure, and did not, therefore, operate as a bar to a recovery in this action. But we think that the judgment should be reversed for the reason that no demand is shown to have been made upon the defendant before the commencement of the action. Where an action is brought, as is the case here, for the wrongful detention of the property, and it does not appear that the original possession of

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the same by the defendant was wrongful, a demand must be alleged and proved. Furthermore, there is no evidence in the case of the value of the property sought to be reclaimed which will support the finding of the justice fixing the same at the sum of $50. For these reasons the judgment must be reversed.

Judgment reversed and a new trial ordered, with costs to the appellant to abide the event.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

JOHN MADDEN, Appellant, *v.* ANNA J. LENNON, Impleaded, etc., Respondent,

(Supreme Court, Appellate Term, June, 1898.)

Mechanic's lien — Proof required of subcontractor.

In order to recover against the owner of premises, a subcontractor must show that something was due from the owner to the principal contractor when the lien of the subcontractor was filed, or that, thereafter, a sum became due from the owner to the principal contractor which sum was applicable to the claim of the subcontractor.

APPEAL from a judgment rendered in the Municipal Court of the city of New York, borough of Manhattan, eleventh district, dismissing the complaint with respect to the respondent Anna J. Lennon.

Earley & Prendergast, for appellant.

Jesse W. Ehrie, for respondent.

Per Curiam. The burden of proof rested upon the plaintiff of showing that there was something due from the owner to the principal contractor at the time of filing the lien, or that thereafter a sum became due from her to such contractor which would be applicable to the payment of his debt to the plaintiff. Lemieux v. English, 19 Misc. Rep. 545; Keavey v. De Rago, 20 id. 105; Van Clief v. Van Vechten, 130 N. Y. 571. He has failed to sustain this burden,

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and the judgment rendered in favor of the respondent Anna J. Lennon, the owner of the premises affected by the lien, must, therefore, be affirmed.

Judgment affirmed, with costs.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Judgment affirmed, with costs.

MARY PARKE ADAMS et al., Plaintiffs, *v.* ANN AUGUSTA ANDERSON et al., Defendants.

(Supreme Court, Albany Trial Term, June, 1898.)

1. Lapsed devise.

A devise, which lapses by the death of the devisee before that of the testatrix, does not become undisposed of realty, passing to the heirs, but goes to the residuary devisee.

2. Statute of Descents — Rights of collaterals of the blood of the father and that of the mother.

An intestate, who left no relatives nearer than first cousins, took a parcel of real estate from his father by descent, conveyed it to his mother for value and subsequently received it from her by devise. Held, that under the Statute of Descents (2 R. S. m. p. 752, §§ 7-12) the parcel must be deemed to have come to the intestate upon the part of his mother and would descend to those of her blood; and that the statutory provision, excluding those not of the blood of the particular ancestor, referred only to the immediate ancestor from whom the intestate received the inheritance and did not refer to a remote ancestor, who was the original source of title.

3. Same — Property, purchased by an intestate, by mortgaging property coming to him on the part of his mother.

An intestate purchased a parcel at a referee's sale and, in order to procure a part of the purchase price, mortgaged other realty which had come to him on the part of his mother.

Held, that the parcel could not be deemed, to the extent of the mortgage, to have come to the intestate on the part of his mother; that, under 2 R. S., m. p. 753, § 13, it descended in equal shares to the descendants of the brothers and sisters of both the father and

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mother of the intestate, and that no equitable lien, to the extent of the mortgage, arose in favor of descendants, claiming as of the blood of the mother of the intestate.

ACTION for partition.

Gaylord Logan, for plaintiffs.

Dyer & Ten Eyck, for defendants Crosby and Birdseye.

Charles J. Buchanan, James C. Matthews, Amasa J. Parker, Jr., William S. Elmendorf, Scott D'M. Goodwin, Joseph A. Spratt, E. A. Carley, James J. Mahoney and Edward B. Root, for various defendants.

CHESTER, J. Philip Wendell Parke died intestate May 30, 1895, leaving no widow, father, mother, brothers or sisters, nor any descendants. He left certain collateral relatives of the blood of his father and others of the blood of his mother. At the time of his death he owned a considerable quantity of real estate. The plaintiffs are heirs of the intestate on the side of his father and have by their complaint sought a partition, or sale and division of the proceeds thereof, among the heirs, regardless of whether the inheritance came to the intestate on the part of his father, or of his mother, or by purchase. The property in question is described in the complaint in twelve separate parcels. The defendants Edward Crosby and his sister Sarah Elizabeth Birdseye, are the only relatives that the intestate left him surviving of the blood of his mother, and they are both first cousins of the intestate. The defendant Hannah Crosby is the wife of the defendant Edward Wendell Crosby. All the other parties to the action are interested in the estate on the side of the father of the intestate. The defendants heretofore mentioned insist that all of the property, except the second piece described in the complaint, came to the intestate on the part of his mother or from relatives of her blood, and ask that the complaint be dismissed as to all the property except that.

It is not disputed that parcel two came to the intestate on the part of his father and descends under the statute to the heirs on his side. Statute of Descents, 1 R. S., p. 752, §§ 7-12, inclusive; Laws 1896, chap. 547, §§ 280 and 288.

Without taking time to review the evidence, I think it is entirely clear therefrom that parcels numbers one, three, four, five,

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six, seven, eight, nine and eleven came to the intestate on the part of his mother, or of relatives of her blood, and descend under the statute to the heirs on the mother's side, that is to the defendants above named.

Parcels ten and twelve did not come to the intestate from either parent, but were purchased by him and, therefore, descend to his heirs-at-law on both sides, in equal shares on each side, as provided by the statute. 1 R. S., p. 753, § 13.

The conclusions above stated, as to all the parcels, except numbers five, eleven and twelve, seem to me too plain to require any discussion. A brief statement of the reasons for my conclusions as to the excepted parcels will be added.

With respect to parcel five, it appears that it came to the intestate by devise, one-half thereof from his mother and the other half thereof from his mother's brother, Philip Wendell, the latter of whom owned an undivided one-fourth interest therein by devise from his father and another undivided one-fourth interest therein by purchase from a sister. Another sister, Elizabeth, owned an undivided one-fourth interest therein. She left a will containing a clause devising her interest to her brother, Philip Wendell, and another clause devising the residue of her estate to her sister, Harriet Wendell Parke, the mother of Philip Wendell Parke. Philip Wendell died before his sister, Elizabeth. On the trial a deed was received in evidence from Eunice Crosby, one of the heirs-at-law of her sister, Elizabeth Wendell, to Philip Wendell Parke, dated January 30, 1880, which purports to convey the property in question. The grantor, however, in this deed had no interest in or title to this property, for the reason that upon the death of Philip Wendell, prior to the death of his sister, Elizabeth, the real estate devised to him did not become realty undisposed of by her will which went to her heirs, but it was a lapsed devise which fell into the residuum of the estate and went to Harriet Wendell Parke, the residuary devisee named in the will. Youngs v. Youngs, 45 N. Y. 254; Cruikshank v. Home for the Friendless, 113 id. 337 at 353.

The deed from Mrs. Crosby, therefore, did not make Philip Wendell Parke a purchaser of the interest purporting to be conveyed thereby, and notwithstanding the deed the inheritance in question came to the intestate by devise from his mother and her brother as above stated.

With respect to parcel number eleven, it appears that Philip Wendell Parke received it by devise from his mother, he having

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conveyed it to her by deed in 1877, for a valuable consideration. It also appears with reference to this property that it first came to the intestate by descent from his father, but that fact is not material upon the issues presented here, for the reason that subsequent to that time the intestate conveyed it to his mother as above stated for a valuable consideration and thereafter received it by devise under her will, and for the further reason that the Statute of Descents, which provides that in case an inheritance comes to an intestate by descent, devise or gift from one of his ancestors, all those not of the blood of such ancestor shall be excluded from such inheritance, refers to the immediate ancestor from whom the intestate received the inheritance, and not a remote ancestor who was the original source of title. Wheeler v. Clutterbuck, 52 N. Y. 67.

Parcel number twelve was purchased by Philip Wendell Parke, the intestate, in 1892, at a referee's sale and was conveyed to him by the referee for a consideration of $12,100. On the trial testimony was received to the effect that $9,000 of the money used in this purchase was raised by Parke by mortgaging parcel number one, and it is urged, therefore, by counsel for the defendants Crosby and Birdseye, that because the latter parcel came to the intestate by devise from his mother's brother, parcel number twelve, to the extent of the $9,000, should still be regarded as property which came to the intestate on the part of his mother, or of a relative of her blood; or if this contention is not upheld, that the court should enforce an equitable lien in favor of said defendants to the extent of this $9,000, upon the property so purchased. I do not think either view can be sustained under the law. The Statute of Descents, after providing that "the inheritance, if the same shall have come to the intestate on the part of his father, shall descend" to the heirs of the father, and that "where the inheritance shall have come to the intestate on the part of his mother" it shall descend to the heirs of the mother, provides that "In cases where the inheritance has not come to the intestate on the part of either the father or mother, the inheritance shall descend to the brothers and sisters, both of the father and mother of the intestate, in equal shares, and to their descendants, in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate." 1 R. S. 752, 753, §§ 10, 12 and 13.

After defining the term "real estate," the statute provides that "the term 'inheritance' as used in this chapter shall be understood to mean real estate, as herein defined, descended according to

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the provisions of this chapter;" (id. 755, § 27), and that "The expressions used in this chapter 'where the estate shall have come to the intestate, on the part of the father' or 'mother,' as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate, by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent." Id., § 29; also see chap. 547, Laws 1896, §§ 280-288.

It is entirely clear that the property in question did not come to the intestate by devise, gift or descent, from his mother or from any relative of her blood, but did come to him by purchase from a stranger to the blood; and it also seems to me clear that the real estate in question — that is the "inheritance" as above defined — not having come to the intestate on the part of either his father or mother, descends as provided in section 13, above referred to, to the heirs of both the father and mother in equal shares as provided in that section.

It is true that when the mortgage was placed on parcel number one, that inheritance was lessened to the extent of the mortgage thereon, and the intestate's interest on that real estate was diminished to the same extent, yet when he received the $9,000 upon the mortgage the money was personal property, no longer subject to the Statute of Descents, but to the Statute of Distributions, and, if he had died intestate with that money in his hands, it would have gone to his administrator, and not to his heirs. Denham v. Cornell, 67 N. Y. 556. And when this $9,000 of value had been so converted into personalty and, therefore, had ceased to be subject to the Statute of Descents, the use of it as a part of the purchase price of parcel twelve had no other effect, in my opinion, on the title of that parcel, as related to the Statute of Descents, than the use of any other money for that purpose would have had. Champlin v. Baldwin, 1 Paige, 562.

There is, of course, much equity in the contention of these defendants, but nevertheless the well-known maxim that equity follows the law applies, and no matter how strong the equity, where the law is clear and fixes the rule of descent, as I think it does in this case, against the contentions of these defendants, the rule of law must govern notwithstanding the equity.

I conclude that there should be an interlocutory judgment in the usual form directing a sale of parcels two, ten and twelve and a division of the proceeds among the parties entitled thereto in ac-

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cordance with their respective interests after paying the costs and expenses of the action, and that the complaint should be dismissed as to all the other parcels described therein, as the defendants Crosby and Birdseye are the absolute owners thereof.

I suppose more properly the complaint should be dismissed as to parcel two also, as the defendants Crosby and Birdseye have no interest therein, but as that property is of such small value as to hardly justify the expenses of a separate action for its partition and all the parties interested therein are in court and have made no objection to its being sold in this action, that course may be taken.

I have not assumed to state the fractional interests of the parties in the property directed to be sold, as I understand there is no dispute as to the degree of relationship of any of them to the intestate. If there is any dispute as to any of their interests, that will be determined upon the settlement of the decree.

Findings and decree may be prepared in harmony with this opinion, the decree to be settled on two days' notice.

The question of costs will be disposed of in the final decree.

Matter of the Petition of HENRY H. LYMAN, State Commissioner of Excise, for an Order Revoking and Canceling the Liquor Tax Certificate of CHARLES A. GILLETT.

(Supreme Court, Onondaga Special Term, June, 1898.)

1. **Liquor Tax Law — Application — False statement as to the number of dwellings for which consents must be filed.**

The Liquor Tax Law (Laws of 1896, chap. 112, § 17, subd. 8, as amended by Laws of 1897, chap. 321) does not require an applicant to state how many buildings, used exclusively as dwellings, are within the prescribed statutory distance of the proposed saloon and for which consents must be filed, and hence a false statement in the application as to the number of such buildings affords no ground for a revocation of the certificate, as the statement is not "material."

2. **Same —**

A statement, in such an application, that the applicant may "lawfully carry on such traffic in liquors on such premises" does not relate to the subject of dwelling-houses, but refers to the provisions of section 24 of the statute, prohibiting traffic in certain places.

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3. Same — Review of determination of county treasurer — Former adjudication.

The court has power, in view of subdivision 2 of section 28 of the statute, to review and correct the action of a county treasurer in issuing a liquor tax certificate to a person who, as matter of fact, did not obtain a sufficient number of necessary consents of the owners of dwelling-houses, and hence, while this issue should in the first instance be determined by the county treasurer, his conclusion, although reached after a protest by the owners of the buildings, has not the force of a former determination, available as a bar.

APPLICATION for an order revoking and canceling a liquor tax certificate.

Mead & Stranahan, for application.

Walter Welch, opposed.

HISCOCK, J. The holder of the certificate made application therefor under subdivision 1, section 11, Liquor Tax Law, in the usual form to the county treasurer of Onondaga county, who granted the same.

The ground upon which it is asked to have the certificate revoked is that there were seven buildings used exclusively for dwellings within the distance prescribed by subdivision 8, section 17, of said law, while the applicant stated in his application that there were only three, and filed under said subdivision 8 the consents for only three.

It is pretty clear that the four additional buildings enumerated by the petitioner were all used as dwelling-houses within the meaning of the statute, as claimed by him. It could not have been the intention of the statute that a dwelling-house should lose its character and become a boarding-house or public place of business, because of such insignificant and incidental facts as were developed by the evidence in relation to the Newell and Woodward houses. The use of the Morris house in part for a physician's office had been discontinued before the certificate in question was granted.

Assuming, therefore, that there were seven houses within the meaning of subdivision 8, section 17; that the applicant's statement that there were three was false, and that he did not have and file the necessary consents to entitle him to the certificate, we reach

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the question whether the petitioner is entitled to have the same canceled as requested.

The application is made, of course, under section 28, of the Liquor Tax Law, and petitioner urges as two grounds for the cancellation, first, that a material statement in the application, viz., that relating to the number of dwelling-houses above discussed, was false; and, second, that the applicant is not entitled to hold such certificate by reason of his failure to file the necessary consents.

I do not think that the application can be granted upon the first ground. The only "material" statement for whose falsity the certificate could be revoked would be one which the applicant was required by law to make. The official charged with the duty of issuing certificates would not have the power by inserting questions outside of those authorized by the statute to lay the possible foundation for false statements and a subsequent revocation of the certificate. There is nothing in the statute which provides for a statement by the applicant of the number of dwellings for which consents must be filed. He is simply required to file the consents and whether they are sufficient in number is a question for determination very likely, as a matter of convenience, to be aided, but not controlled by, his statements. People ex rel. Anderson v. Hoag, 11 App. Div. 74.

Neither does the statement in the application that the applicant may "lawfully carry on such traffic in liquors on such premises," relate to this subject of dwelling-houses. That manifestly refers to the provisions of section 24, prohibiting the traffic in liquors in certain places.

Upon the second ground, however, that the applicant was not and is not entitled to the certificate by reason of failure to obtain the necessary consents, the relief asked for should be granted unless one of the contentions of the defendant now to be considered is well founded.

It appears that after the application for the certificate was presented to the county treasurer a protest was also presented to him in behalf of the owners of the dwelling-houses in question raising the same issue of lack of necessary consents which is involved in this proceeding. Thereafter the county treasurer, notwithstanding such remonstrance, issued the certificate, and it is claimed that his action was judicial and a bar to this proceeding.

I think that under the provisions of section 19, as amended by chapter 312, Laws of 1897, the county treasurer was called upon

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to determine as a question of fact whether the necessary consents had been obtained; that as before suggested this was not one of the matters which the application was required to disclose upon its face, and that even if it did purport to do so the county treasurer was not bound thereby. This provision was not one which the treasurer was required or permitted to disregard to the end of issuing a certificate under the clause requiring him to so issue when the application "does not show on the face thereof that the applicant is prohibited from trafficking in liquor."

But all this being so, the question still remains whether this court in this proceeding cannot in effect review and correct the act of the treasurer in issuing a certificate when he should not have done so. Ordinarily such review by anybody at least who was legally a party to the proceedings would be by *certiorari* as suggested by defendant's counsel. But the legislature in treating this subject, of course had the power to provide for what should in effect be a review of the acts of a treasurer by a proceeding other than *certiorari*, and at the instance of persons who would not have any standing to institute the latter. It seems to have done so. Subdivision 2, section 28, seems to have provided in the most comprehensive language possible that "at any time" after a certificate has been granted "any citizen of the state" may institute a proceeding such as this to have revoked a certificate upon the broad general ground, in addition to those specifically enumerated, that the holder "was not entitled to receive or is not entitled * * * for any * * * reason to hold such certificate." It is the general rule that only parties and privies to a determination are bound by it, and independent of the language used, specifically combatting such an intention, it would be somewhat anomalous for the statute to give "any citizen" the right to question the validity of an issue of a certificate and then bind him by a decision of an officer in a proceeding of which very probably he never heard until after its conclusion.

The case of People ex rel. Anderson v. Hoag, cited by defendant's counsel, does not seem to conflict with this holding. That proceeding was by *certiorari* under other provisions than those quoted (if under this statute at all), and by the applicant, who, of course, was a party to the proceeding before the treasurer. Under the wording of the statute in that proceeding the court applied the ordinary rule of determination in bar.

These views lead to an order canceling and revoking the certificate in question.

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Costs are allowed to the petitioner to the amount of disbursements actually incurred in the proceeding, including referee's fees to be taxed by the clerk and also $50 counsel fee.

Ordered accordingly.

LIZZIE WILSON, Plaintiff, *v.* MARIA HEATH et al., Defendants.

(Supreme Court, Orleans Trial Term, June, 1898.)

Specific performance — Oral promise of a testator to provide for one as if she were his child and he had died intestate — Trust — Failure of proof.

An oral promise by a testator that, if the promisee would assume his name and live with him as his daughter until her marriage, he would care for her in all respects as if she were his own child, and would give and make over to her the same proportion of all his property real and personal as she would inherit by law were she his own daughter and he to die intestate, is, when followed by full performance, operative and imposes upon the property of the testator a trust, enforcible in equity against his devisees and heirs-at-law.

Specific performance must, however, be refused where the claimant fails to establish, by clear and convincing proof, a contract definite and certain in every essential.

Orrin Heath died January 25, 1890, leaving a landed estate of about $22,000, and personal property of the value of about $2,500. The defendant, Maria Heath, his widow, aged about sixty-eight years, survived him but no descendants. He left a will which was executed March 13, 1889, and admitted to probate March 10, 1890, by the terms of which his widow was made the sole beneficiary and executrix, and she thereafter qualified as such.

The plaintiff was born in 1860, of poor parents, and was one of several children. When of the age of about eleven years, with the full consent of her parents she went to reside with, and in the family of the testator, where she remained until her marriage in June, 1888. During the time she lived in the testator's family she was known and introduced as Lizzie Heath; she became a member of the same church, was educated, clothed and introduced by them as a daughter, and so treated and considered up to the time of her marriage. In return she was obedient, assisting in the family house-

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work, and in every essential performing the duties of an adopted daughter with circumspection, from 1871 to the time of her marriage in 1888.

June 10, 1890, the plaintiff presented a verified claim against the estate of the testator for $35,000. The same was immediately rejected by parol, and thereafter, on June 16, 1890, it was formally rejected in writing. June 11, 1890, an action was commenced in this court by the plaintiff against the executrix of the will of the testator, to recover the amount of the claim so presented and rejected. The complaint contained the following allegation: "That on or about the 1st day of March, 1871, Orrin Heath, late of Medina, N. Y., made and entered into an agreement with this plaintiff, whereby he promised and agreed in consideration of the plaintiff's assuming his name, Heath, in the place of her name, Hannan, and of plaintiff's living with him as his daughter until she should marry, to care and provide for this plaintiff in all respects as if she was his own child, and to pay her the sum of $2,000, and to give her a complete outfit of all needed and proper things with which to go to housekeeping, at such time as she should marry, and the said Orrin Heath further promised and agreed then and there, to give and make over to this plaintiff the same proportion and share of all his property, real and personal, as she would inherit by law were she his own daughter and he to die intestate. That on or about August 20, 1877, the substance of said agreement was reduced to writing and duly executed and delivered by said Orrin Heath to plaintiff." Then followed allegations of performance by plaintiff, of the agreement alleged, essential to support a money judgment, and breach by the testator. Upon the trial the justice presiding at that time declined to pass upon the validity of the contract, respecting the clause purporting to reserve to the plaintiff a daughter's share, and limited the issues to the determination of the authenticity of the writing alleged to have been executed by the testator, the recovery thereunder of $2,000, and the value of an outfit. The writing involved in that trial is as follows:

"West Barre, *Aug.* 20, 1877.

"This is to certify that Mr. Heath of Medina agrees to pay Lizzie Hannan, daughter of Robt. Hannan, if she stays with him and goes by the name of Lizzie Heath, and his daughter, he would provide for her in every respect as his own child; if she gets married and settles in life I do bind myself to pay her $2,000, also give her

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a good fit out and she will also have a daughter's share in all that I have.

"ORRIN HEATH.

"Robert Hannan, witness.
"Wm. Hannan, witness."

The verdict of the jury was adverse to the plaintiff, and the paper writing was thereby declared a forgery and final judgment was entered thereon, June 5, 1891, dismissing the complaint upon the merits. Upon the trial neither party, under the ruling of the court, gave evidence respecting the oral agreement of 1871, as bearing on the probable execution of the alleged written agreement.

In January, 1896, this action was brought against the widow of the deceased, individually and as executrix, the devisees and legatees named in his will and heirs-at-law, to compel the transfer and conveyance of the estate of the testator, exclusive of the widow's dower interest and distributive share in the personal estate, to the plaintiff. The right to such a judgment is founded upon a complaint substantially the same as the one quoted, except the alleged written agreement is omitted therefrom, and no claim is made therein for $2,000 or the value of an outfit. The answer of the widow, Maria Heath, individually and as executrix, puts in issue the parol agreement of 1871 and also contains allegations appropriate to defenses in avoidance. The court at Special Term upon the application of the defendant, Maria Heath, made an order formulating a question sufficiently broad to cover the inquiry; whether or not the parol agreement alleged in the complaint was made by and between the deceased and Robert Hannan, the father of the plaintiff (acting in her behalf), in March, 1871. The parties had a hearing before a jury, and the question tried and submitted was, by the verdict, answered in the affirmative. The case was then tried before the court upon all the issues raised by the pleadings.

Whedon & Ryan, and George Raines, for plaintiff.

E. L. Pitts, and S. E. Filkins, for defendant.

LAMBERT, J. The finding of the jury is not a final determination, but evidential only of the issues passed upon and proper to be considered by the trial court upon an application for equitable relief. It may be adopted or disregarded as justice and a due re-

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gard for the rights of the parties demand. Vermilyea v. Palmer, 52 N. Y. 471; Learned v. Tillotson, 97 id. 1; Acker v. Leland, 109 id. 5; Randall v. Randall, 114 id. 499.

The practice enunciated by these authorities permits the consideration and determination of all the facts of the case by the trial court, and it is only when the conclusion reached by the jury has the support of evidence, of the force and convincing qualities required by the settled principles of equity, that it should be adopted as conclusive, and permitted to control the result of a controversy of this character. The contract in question, and by this action sought to be established and enforced, is so extraordinary in character and consequent results, that the advice afforded by the verdict should not be given conclusive influence in determining the rights of the parties. Ordinarily deference would and should be accorded the finding of a jury upon a disputed question of fact, but when the evidence which gives it support is improbable, uncertain and doubtful, the verdict should not be permitted to dominate the disposition of the case. The agreement alleged is, in substance, that in consideration of the plaintiff becoming a member of the family of the deceased and remaining until the event of her marriage, in all respects conducting herself as a daughter, the deceased would educate and clothe her, and, at his death, whatever property he had, less the legal estate therein of his widow, should become the property of the plaintiff, and provision would be by him made to effectuate such result. The enforcibility of the agreement is assailed by the defendant for the reason, among others, that at the inception of the contract relation, and at all times during its performance by the plaintiff, the minds of the parties never met upon the measure of compensation, in money or specific property, that the plaintiff was to receive for the services in contemplation, and was limited only by the uncertain contingencies of future events; also, that by the terms of the alleged agreement there was no express or implied limitations upon the power or right of the deceased to dispose of his property during his lifetime. There is reason and authority to support this contention. Lisk v. Sherman, 25 Barb. 434; Shakespeare v. Markham, 10 Hun, 311; affirmed in Court of Appeals, 72 N. Y. 400; Gall v. Gall, 64 Hun, 600.

In the last case cited, Barrett, J., says: "We have, however, found no case in this state where an agreement to leave the whole of one's estate, real and personal, to a particular person has been

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enforced. On the contrary, there are cases where specific performance of such a contract has been refused."

The case of Godine v. Kidd, 64 Hun, 585, much relied upon by the plaintiff, presents a statement of facts that substantially quadrate with the allegations made by the plaintiff, and the court there permitted execution of the agreement, but put its decision upon the express ground that the judgment would effectuate the intent and purpose of all the parties thereto. In many of the states the more liberal doctrine is adopted, that contracts like the one in question when clearly and unequivocally established and fully executed by one party are enforcible. Jaffre v. Jacobson, 4 U. S. App. 5; McKinnon v. McKinnon, 56 Fed. Repr. (Mo.) 409; Kofka v. Rosicky, 41 Neb. 328; Sutton v. Hayden, 62 Mo. 101; Sharkey v. McDermott, 91 id. 655; Brinton v. Van Cott, 33 Pac. Repr. (Utah) 218.

In the measure of equitable relief to be given to a party who has faithfully performed the obligations of a contract made by the parents of a party while in infancy with parties having no offspring and contracting for parental relations; and where the parties are adults, and, therefore, presumed to occupy positions of equality in making and performing the contract, a distinction is manifest in the cases. Where the services and companionship of infants, during minority, is the subject of contract, attributes of confidence and mutual consideration, arising from affection and acts of kindness, which have no exact measureable quality and yet may constitute the substantial element of benefit in the estimation of the contracting parties, it has been held that execution of such a contract by a court of equity is the only commensurate relief to the full and complete performance by the infant. The ultimate disposition that I feel constrained to make of this case renders it unnecessary to do more than to follow the adjudication heretofore made in this action upon the issue of law raised by demurrer to the complaint. It is there decided that the complete and full performance of the agreement alleged, by the plaintiff and her parents, made the promise on the part of the deceased operative, and a trust was imposed upon his property which is enforcible in equity as against his devisees and heirs-at-law. Heath v. Heath, 18 Misc. Rep. 521.

The judgment sought in this case if granted will have the result of rendering ineffectual the testator's will, and passing to the plaintiff the title to all the property left by him at his decease, subject only to the claims made thereto by law for the widow. Justification

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for such a judgment can only be found in a contract fully executed by the plaintiff, definite and certain in every essential, and made to appear by clear and convincing proof, and such is the doctrine of all the cases which have been cited by counsel or which I have been able to find. If, therefore, the proof submitted does not bring the case within the rule requiring execution of the contract alleged, then the parties must be left to their redress at law. Lisk v. Sherman, 25 Barb. 434; Shakespeare v. Markham, 10 Hun, 311; affirmed, 72 N. Y. 400; Gall v. Gall, 64 Hun, 600; Godine v. Kidd, 64 id. 585; Nickerson v. Nickerson, 127 U. S. 668; Hennessy v. Woolworth, 128 id. 438; Dalzell v. D. M. Co., 149 id. 315.

A careful examination of the proof drawn from an analysis of the evidence, and the circumstances surrounding the parties, leads me to the conclusion that the plaintiff has failed to establish a case justifying specific performance of the contract alleged, within the rule required by the authorities. The proof must be clear and leave no essential element of the contract in doubt. This is the burden placed upon the plaintiff both by reason and the authorities. To meet it the plaintiff relies upon the evidence given by her father and two brothers, respecting the occurrences which took place between the deceased and her father in the spring of 1871. By them is recited the essential details of an agreement, which, if performed by the plaintiff, entitles her to the entire estate left by the deceased, provided only that both should live until the plaintiff reached the age of twenty-one years. Not only is the promise of the deceased to make the plaintiff the recipient of all the estate that a child of his own blood would take, he dying intestate, made plain and amplified by its varied connection during the course of the examinations, but it is stated by each, with almost uniform precision, when asked how he was to accomplish such a result, the testator replied, that he would do whatever was necessary to pass his property to the plaintiff upon his death. These three witnesses were sworn in behalf of the plaintiff, in an action to recover the value of the testator's property, upon this same subject, and the record evidence of that trial will be searched in vain for any reference to the subject of making over all of his property, subject to his widow's right, to the plaintiff; or that he would give to the plaintiff an estate in the property left by him at his decease, such as a daughter would inherit, he dying intestate. It is there recorded that they severally testified, in substance, that he, the testator, agreed, he would do by the plaintiff as if she were his own daughter, and further that she should have a daughter's

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share in all his property. Why this discrepancy in the two records containing the testimony of these witnesses upon the same subject? So far as the evidence of the brothers William and John, is concerned, this fatal disparity cannot be excused as an accident, for their evidence on each occasion was taken by commission, in advance of the trial, and they were severally requested to detail the entire transaction in question. Upon the record made upon the former trial all must concede that the agreement between the testator and the plaintiff's father, as indicated by the plaintiff's evidence, was so uncertain that it could not be made the subject of execution by a court of equity. The limit of obligation imposed by the recorded promise of the testator, was to give the plaintiff a daughter's share in all of his property. The undertaking, thus assumed, left it optional with the testator to reward the plaintiff as he would a daughter, depending upon events which were then unknown and unknowable; while the obligation and duty imposed by the contractual relation now detailed, impose an imperative requirement to make over whatever property which existed at the time of his death to the plaintiff. The conflict in this evidence is irreconcilable and so far discredits the evidence of these three witnesses, that, if otherwise uncontradicted, it could not be made the basis of the decree sought by the plaintiff in this case. Events of remote date, in detail, cannot be expected to be within the memory of a witness, and, in some part, circumstances attending a given occurrence may be reproduced in haze; but, if involving matters of interest, we must expect and require substantial memory of the substance. The unreliability of the evidence of the witnesses referred to is again disclosed and made manifest by the terms of the alleged written and executed agreement by the testator, bearing date August 20, 1877. The complaint in the former action contained the allegation that the parol agreement of 1871 was, in substance, reduced to writing by the parties in 1877, wherein it was provided that the testator should pay to the plaintiff the sum of $2,000 and furnish her a good outfit, in the event of her marriage before the death of the testator; and further that she should have a daughter's share in his property. This allegation had the support of the evidence of the witnesses mentioned, and the remarkable instance is presented, that no reference is made upon either trial, in the detailed account of the occurrences of 1871, to the promise of the testator to pay to the plaintiff $2,000, or furnish her an outfit. If, as alleged, the written agreement of 1877 was intended as evidential only of the parol agreement

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of 1871, it is incomprehensible that such important provisions should have been omitted or forgotten. It is equally pertinent to note the absence from the writing, of any undertaking by the testator to give to the plaintiff and make over to her his entire estate subject to the legal claims of his widow. In this respect the writing is in harmony with the evidence given on the former trial upon that subject, and in conflict with the version now detailed.

The theory of the defendants, that the plaintiff became a member of the testator's family upon the understanding that for the services she might render during her minority, the testator would maintain, clothe and educate her, is more acceptable than the position sought to be maintained by the plaintiff. It has the support of the witness Fuller, who was present when the arrangement was made, and the well-nigh conclusive support of probability. It overtaxes the credulity of one to adopt the assertion that the testator, after passing nearly an expected life with the companion of his choice, who had aided him in his every endeavor to accumulate his moderate property, should, without the imposition of any condition for her support and maintenance, in the event she should outlive him, agree to turn over his entire estate to a person with whom and whose parents he had not the slightest acquaintance. It is incredible. He knew nothing of her disposition, or whether she might develop to be an agreeable companion for either his wife or himself. No inquiry was made respecting her habits, temperament or life, or respecting her parentage, and yet we are asked to believe that he selected her as his only beneficiary to the exclusion of his wife, in the event she and his wife survived him. A conclusion involving such ingratitude and inhumanity must have better support than is found in the record in this case, before I can adopt it. It is possible that it is true, but improbable.

The claim is made that the evidence of the father and brothers of the plaintiff find adequate corroboration, to satisfy the requirements made essential to specific performance, in the treatment of the plaintiff by the testator and his wife as a daughter, and the faithful conformity by her in return to an affectionate and obedient regard, as well as the admissions of the testator respecting the affection that he entertained for her at various times. Undoubtedly, the plaintiff by her submissive conduct, affectionate obedience and attractive ways, grew into the life of the testator and his wife, and a just pride by them in the development of her tastes, habit and character was but a natural result. The declaration that she was his daughter and

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should eventually have all that he or they had is equally as consistent with an expression of present gratification and attachment, as with attributing to the testator a disclosure of his contract obligations made years before. The expression by the testator that he regarded the plaintiff the same as he would his own child, and that he intended she should have his estate, has no necessary or logical connection with an agreement requiring such a disposition of his property. On the contrary it was the declaration of his present feeling and purpose, and as such could have no creative force as a contract obligation. The undisputed fact that the plaintiff rendered faithful service to the testator and his family through a long period of time, gives rise to an instinctive sense of justice that she should have some measure of relief, but when the evidence is analyzed in the light of established rules applicable to a case of this character, the injustice which would result from the enforcement of the agreement becomes at once obvious.

The complaint should be dismissed upon the merits, but without costs to either party.

Complaint dismissed, without costs to either party.

ERNST LASCHE, an Infant, by his Guardian, Etc., Plaintiff, *v.* JAMES W. DEARING, Defendant.

(Supreme Court, Kings Special Term, June, 1898.)

Negligence — Order of arrest — Execution against the person.

The nature of an action, for damages for personal injuries caused by the alleged negligence of an owner of real property in not keeping the ropes of a dumb-waiter in repair and also charging his servants with negligence in the matter, is not such as to justify an order of arrest, and where no such order has been made in the action, an execution against the person is not authorized by the provisions of section 1487 of the Code of Civil Procedure.

MOTION to set aside an execution against the person in an action for negligence.

Eugene V. Brewster, for plaintiff.

S. Bishop Marks, for defendant.

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JOHNSON, J. A judgment has been recovered in this action against the defendant for over $1,000, and he is now held under execution against the person. Application to release him is made on the ground that this is not an action in which an execution against the person is allowed, no order of arrest having been made.

The pleadings show that the action was for an injury caused by the breaking of the ropes sustaining a dumb-waiter. The allegation of the complaint is that the defendant owned the building, and was negligent in not repairing the ropes, having knowledge that they were out of repair; it is also alleged that the injuries were caused by the neglect and carelessness of the defendant, his agents, servants and employees.

In his moving papers, the defendant states that he was not present at the time the injury occurred, and knew nothing of it. That statement is denied. While any fact presented inconsistent with the judgment would be of no effect, it is nevertheless clear that that statement is entirely consistent with all that the judgment decides or implies. Hence this case is practically a case for negligence, negligence of omission rather than commission, from which a personal injury has resulted; and the question is whether or not an execution against the person can be issued in this case.

No order of arrest having been granted; hence the question here is whether or not the *nature of the action* was such as to give cause for arrest. § 1487, Code Civil Procedure. That brings us directly to section 549, which occupies nearly a page in stating and very carefully defining the different cases in which an arrest is allowed. Clearly none of the cases there stated apply here unless this is a case "to recover damages for a personal injury." But a "personal injury" is defined in section 3343 as follows: A "personal injury" includes libel, slander, criminal conversation, seduction and malicious prosecution; also assault, battery, false imprisonment or *other actionable injury* to the person either of the plaintiff or of another.

Clearly none of the cases specifically stated in the definition apply. This was neither an action of libel nor of false imprisonment, nor of either of the classes specified between these two. If there is anything in the definition, which affects this case, it is in the general words "other actionable injury to the person." This must be so, and it is practically so assumed and stated in all the cases which relate to this question. Hence the question here simply is;— what do those general words, as they there stand related and connected, mean, — what, if any, additional right of arrest do they give? Any mean-

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ing allowed them, which is broad enough to include this case, makes them broad enough to include assault and battery, the specific cases stated immediately before; and so makes surplusage the words "assault" and "battery" and perhaps other words. But a construction which makes useless those pivotal and important words is obviously faulty if any other construction is allowable.

Besides, there is another rule which seems to clearly forbid this execution to stand. It is well settled that when specific words are closely connected, as here, with general words, the specific words characterize the general words, so limiting or restraining them as to indicate a class of cognate or related rather than that of diverse kinds. Hickey v. Taaffe, 99 N. Y. 204; Wakefield v. Fargo, 90 id. 218; People v. Richards, 108 id. 137; Matter of Hermance, 71 id. 481; People v. N. Y. & M. B. R. R. Co., 84 id. 565.

The rule stated in these cases would lead us to construe the definition quoted as though the specific words had been followed by the words "or other *similar* actionable injury." Applying that rule to this case, the whole definition is at once clear and harmonious, and all its words mean something. All the specific words state cases of affirmative and active wrong with more or less of turpitude according to the character of the wrong. And those words, the center and core of the definition, characterize these general words, and prevent them from being construed so as to allow an arrest for anything so different as a mere omission, or the wrong of an omission, even though negligent and careless, and resulting, as in this case, in an injury to the person.

And the contrary view would lead to still other absurdities. If these general words are to be construed as though they stood alone, then we have a definition which says, in effect, that a personal injury is an injury to the person, a result obviously absurd.

The proper view of this definition, it seems to me, is this: Its first part, "libel," "slander," etc., bring into it wrongs which otherwise might not be classed as personal injuries; while its last words "assault," etc., characterized and restrained what otherwise might be deemed the natural import of the general words. That makes it truly a definition, *ex*cluding as well as *in*cluding, and in a proper and correct sense, defining a class.

The rule that penal statutes are to be strictly construed, it seems to me, also applies to this case, and if it were otherwise in doubt, that rule would resolve it against a construction which would give a remedy by arrest and imprisonment.

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As sustaining a contrary view, reference has been made to section 553 of the Code of Civil Procedure. That section provides, in effect, that a woman cannot be arrested under the provisions of that title, except in proceedings in the nature of contempt, and for *wilful* injury to person, character or property. From that, it has been held that the test as to the right to arrest a man, in an action for personal injury, is not dependent on whether or not the act is wilful, or on the character of the act, so long as a personal injury results. Ritterman v. Ropes, 52 N. Y. Super. Ct. 236. But a consideration of the effect and scope of section 553, I think, clearly repels that inference. That section certainly relieves a woman from arrest in any and all cases where, being the plaintiff, a judgment for costs is given against her. Equally it relieves her from arrest in an action founded on a breach of promise to marry, or for the appropriation of money received as agent or in a fiduciary capacity; and, doubtless, in many cases of slander or libel. Hence, it follows that the section relieves, or may relieve, a woman from arrest in nearly all the cases specifically stated, in which such a remedy would otherwise run against her. With that large and adequate effect as to the arrest of women in those cases specifically stated, it would hardly seem right to give it an ulterior effect, as the arrest of men, by enlarging general words upon which the section does not seem to have any direct effect.

There are authorities which indicate the contrary view, but, I think, the fact that orders of arrest are not ordinarily claimed in negligence cases, and are not usually obtained against the plaintiff where the judgment is for the defendant (see Miller v. Woodhead, 52 Hun, 127), should have some weight in construing this section. But I feel compelled to decide the question on the general and well-grounded rules which seem to me to control, rather than on the very few cases which are claimed to apply to this particular section of the Code.

The discharge of the defendant is also urged under section 572 of the Code, on the ground that execution against the person was not issued until about nine months after the entry of judgment. I am inclined to think that section does not apply to this case. But, holding the view here stated, I deem it unnecessary to pass upon that question.

Motion to set aside the execution against the person granted.

Motion granted.

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THOMAS FARRELL et al., Plaintiffs, v. THE NEW YORK STEAM CO., Defendant.

(Supreme Court, New York Special Term, June, 1898.)

Nuisance — Operation of the plant of a steam company.

Proof that, when the wind is in a certain quarter, cinders and soot from the smokestack of the building of a steam company fall upon the premises of a neighboring owner, that the occupants of these premises are somewhat disturbed by noises made by the iron shutters of the furnace of the steam company and by the unloading of its coal, that foul odors are produced to some extent by the steam company's pouring water on heated ashes, and that more or less heat comes from its boilers, does not sufficiently indicate that the steam company is maintaining a nuisance, nor entitle the neighboring owner to maintain an action for an injunction restraining the steam company from carrying on a business in itself lawful.

ACTION for a permanent injunction to restrain operation of a steam plant.

Epstein Brothers (Otto Irving Wise, of counsel), for plaintiffs.

James W. Hawes, for defendant.

TRUAX, J. The evidence shows that when the wind is in the east some cinders and soot from the smoke-stacks of the building belonging to the defendant fall upon plaintiff's premises; that occasionally the occupants of said premises are somewhat disturbed by noises made by the iron shutters of the furnace on defendant's premises, and by the unloading of coal belonging to defendant; that foul odors are to a greater or less extent produced by the defendant's pouring water on heated ashes; and that more or less heat comes from the boilers belonging to and used by the defendant. But the evidence does not show that any of the above-mentioned things was caused by the negligence of the defendant, or that taken altogether they amount to a nuisance or materially lessen plaintiff's beneficial enjoyment of his property. In the respects above mentioned this case is unlike Cogswell v. Railroad Co., 103 N. Y. 10; Bohan v. Gas Light Co., 122 id. 18; and Baltimore & Potomac R. R.

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Co. v. Fifth Bap. Church, 108 U. S. 317, in which cases it was held that the acts complained of were nuisances. The defendant is engaged in a lawful business. In the language of the Court of Appeals in Booth v. Railroad Co., 140 N. Y. 280, while the protection of property is one of the great reasons for government, it is the equal protection to all that the law seeks to procure. The rule governing the rights of adjacent landowners in the use of their property seeks an adjustment of conflicting interests through a reconciliation by compromise, each surrendering something of his absolute freedom in order that both may live. To prevent the defendant from using its lot as it is using it, at the instance of the plaintiff, would not be a compromise between existing rights, but an extinguishment of the rights of the defendant for the benefit of the plaintiff. This sacrifice the law does not exact. I have said that the evidence does not show that the acts of the defendant have materially lessened plaintiff's enjoyment of his property. By this I mean those acts of the defendant of which the plaintiff has the legal right to complain. Some of the witnesses said they did not like the looks of the building erected by the defendant, and that for that reason, as much as for any other reason, they were going to leave the neighborhood. But that plaintiff's tenants or others do not like the looks of defendant's building does not furnish a legal ground of complaint against the defendant. The neighborhood in which plaintiff's house is situate has changed in the last few years; but this change was not caused by the erection and use of defendant's building. In fact, such change began long before defendant's building was commenced. It may be that plaintiff's property does not fetch as much rent now as it did a few years ago; but the evidence does not show how much of this loss of rent was occasioned by the defendant, and how much of it is due to facts and circumstances for which the defendant is not legally responsible. For the reasons above stated, I am of the opinion that the complaint should be dismissed. But it should be dismissed, without costs. Let judgment be entered dismissing the complaint, without costs.

Complaint dismissed, without costs.

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JAMES G. HYDE, as Receiver, etc., Plaintiff, *v.* LYMAN G. BLOOMINGDALE et al., Defendants.

(Supreme Court, New York Special Term, June, 1898.)

Fraudulent transfers by insolvents for an inadequate price, paid in cash — Notice to fraudulent mortgagees.

Proof that creditors of insolvents, about to abandon business and whose property, as the creditors were apprehensive, was liable to be attached, took from the insolvents, in consideration of an antecedent debt and of fresh money required to be paid in cash, chattel mortgages on all the available assets of the insolvents, these having a value of more than double the sum secured, that, at a sale, these creditors purchased the chattels at a wholly inadequate price and immediately opened a carriage department with the chattels, which they had hurriedly removed, sufficiently indicates that the creditors and mortgagees had notice of the illegal intent of the mortgagors, and justifies the court in vacating the chattel mortgages as constituting an attempt to reduce, *pro tanto*, the assets available to creditors generally and to assist the mortgagors in removing such assets beyond the reach of process.

ACTION upon a chattel mortgage.

The opinion sufficiently states the case.

Samuel Untermyer and Louis Marshall, for plaintiff.

Horwitz & Hershfield, for defendants Bloomingdale.

Samuel Fleischman, for defendants Krauss.

PRYOR, J. The plaintiff impeaches a chattel mortgage by the defendants Krauss to the defendants Bloomingdale.

The fraud of the mortgagors is flagrant; but the payment of a valuable consideration by the mortgagees is conceded. Such payment, however, in the absence of good faith is ineffectual to validate the mortgage. Billings v. Russell, 101 N. Y. 226; Blennerhassett v. Sherman, 105 U. S. 100, 117.

Upon proof of the consideration the burden devolves on the plaintiff to establish the evil intent of the mortgagees. Starin v.

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Kelly, 88 N. Y. 418; Billings v. Russell, 101 id. 585; Crawford v. Neal, 144 U. S. 585. The decision of the case turns upon the question whether the evidence suffices to implicate the defendants Bloomingdale in the fraud of the mortgagors.

It is the law of this state that "when a vendee purchases property for the purpose solely of receiving payment of an honest debt, the fact that the vendor sold with intent to hinder and delay his creditors does not make the sale void as to such creditors, and this, although the vendee had knowledge of such intent; it must be made to appear that the vendee participated in the fraudulent intent." Dudley v. Danforth, 61 N. Y. 626; Knower v. C. N. Bank, 124 id. 552, 560; Seymour v. Wilson, 19 id. 417, 421; Hine v. Bowe, 114 id. 350, 354; Jewett v. Noteware, 30 Hun, 194; Auburn, etc., Bank v. Fitch, 48 Barb. 344. The right of a failing debtor to give and of his creditor to receive a preference, even to the exhaustion of his entire estate, is not open to question. Swift v. Hart, 35 Hun, 128, 130; Wait on Fraud. Conv., § 390. The property of a failing debtor is equally accessible to all his creditors; and if one, by superior diligence, obtains security or satisfaction, he does no legal wrong to others. Archer v. O'Brien, 7 Hun, 146, 148. By appropriation to the preferred creditor such property is applied to the purpose to which the law devotes it — the discharge of the debtor's obligations (Beels v. Flynn, 26 Am. St. Rep. 351, 354); and hence no other creditor has cause of complaint. When, however, one receives property of a debtor for a present payment, the case is different and another principle prevails. For, then such property is diverted from its legitimate destination; the assets available to creditors reduced *pro tanto;* and the debtor facilitated in removing them beyond the reach of process. In reason, to invalidate the title of one who so enables a debtor to elude the claims of creditors, it should suffice that he have notice of the fraudulent intent which his act has contributed to consummate. But, nothing less than such notice or its equivalent will vitiate a transfer for value. Wilson v. Marion, 147 N. Y. 589, 596; Bush v. Roberts, 111 id. 278; Parker v. Conner, 93 id. 118.

In Anderson v. Blood, 152 N. Y. 285, 293, the parties defrauded were beneficiaries of the estate; and it was conceded that a more vigilant precaution was due to them than to general creditors. Moreover, the remarks of Gray, J., were *obiter*, and are not to be accepted as a reversal of the rule so long prevalent in the jurisprudence of the state.

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In the case at bar, the defendants Bloomingdale received the mortgage as well for a present advance as to secure an antecedent debt; and "the same rule is applicable as to third persons purchasing for a new consideration." Levy v. Williams, 79 Ala. 171, 176.

The specific fraud of which the defendants Krauss are convicted is that they made the mortgage with intent to sequester its proceeds from their creditors; and it is to be ascertained whether of such intent the defendants Bloomingdale had notice, or its equivalent; that is, whether they knew or believed the mortgage was made with fraudulent intent. Parker v. Conner, 93 N. Y. 118, 126.

It is upon the testimony of the defendant Lyman G. Bloomingdale, that the plaintiff relies for proof of his participation in the guilty purpose of the mortgagors. He repudiates, of course, any knowledge or notice of the intent of the mortgagors to appropriate the money he paid them in fraud of the rights of their creditors. But "What favorable facts the party calling him obtained from such a witness may be justly regarded as wrung from a reluctant and unwilling man, while those which are unfavorable may be treated by the jury with just that degree of belief which they may think is deserved, considering their nature and the other circumstances of the case." Becker v. Koch, 104 N. Y. 394, 401.

On the examination of the defendant Lyman G. Bloomingdale these facts were developed: That he knew the defendants Krauss were hopelessly insolvent, pressed by creditors, and about to abandon business; that "they wanted the money right away," and that, to get hold of $6,000 at once, they offered a mortgage of all their available assets, in value more than double the sum secured. Another witness testified that during the negotiation for the loan Bloomingdale avowed an apprehension of impending attachments by the creditors of Krauss, and this, though questioned on the subject, he did not venture to deny. From these circumstances what inference was reasonable, but that Krauss was turning his goods into money to escape the pursuit of creditors? Still more significant of such intent is the fact that Krauss refused a check, and that to accommodate him Bloomingdale's attorney furnished him the cash. Notice to his representative was notice to Bloomingdale. Anderson v. Blood, 152 N. Y. 285, 295.

It is testified that Krauss told Bloomingdale the money was wanted "to pay some confidential debts;" but he seems not to have relied upon the statement, for he swears that he had no "opinion," "belief" or "suspicion" as "to what they intended to do with the

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money." And, indeed, the pretense was transparent; for the obvious and the usual way of providing for confidential debts is by an assignment with preferences.

"Other circumstances in the case" (104 N. Y. 401)) indicative of the bad faith of the defendants Bloomingdale are, the relations between the parties, the coincidence of the mortgage with the opening of the carriage department, the disparity between the debt and the security, the sacrifice at the sale, the purchase by the Bloomingdales themselves at a sale so conducted that an adequate price was impossible, and for a sum enormously below the actual value of the property, and the hurried removal of the goods to prevent interception by the creditors of Krauss.

Argument is made that it is not likely the Bloomingdales would advance their money with knowledge of the fraud and on an invalid mortgage. But the compensation was equal to the risk, for they thus secured an otherwise worthless debt of $5,000 and supplied their carriage department with stock at half price.

Notice of the illegal intent of the mortgagors need not be established by positive proof, but may be inferred from circumstances. Ross v. Caywood, 16 App. Div. 591. I am of opinion that no other deduction from all the facts of the case is permissible than that the Bloomingdales were aware of the purpose of the defendants Krauss to defraud their creditors. Herman v. McKinney, 47 Fed. Repr. 758; Beels v. Flynn, 26 Am. St. Rep. 351. "If a creditor do more than obtain his debt and thereby put it in the power of his debtor to hinder, delay or defraud other creditors, and does it for that purpose, the act in going beyond what he legitimately might do will taint and vitiate the whole transaction; as where he takes more goods than are necessary to pay his debt and pays the difference in money to his debtor." Meyberg v. Jacobs, 40 Mo. App. 128, 137. "A creditor may lawfully receive from a failing debtor in payment, property reasonably proportioned in value to the amount of the debt; but if he receives property of greater value than the amount of the debt and pays the excess to the failing debtor, he aids the latter to place his property beyond the reach of his creditors; and the transfer will be set aside, not only to the extent of the excess in value, but as to all the property transferred." Black v. Vaughan, 70 Tex. 47, 49.

The mortgage is void *in toto*. Swift v. Hart, 35 Hun, 128, 131; Baldwin v. Short, 25 N. Y. 553.

Judgment for plaintiff, with costs.

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THE PEOPLE ex rel. THE UNITED AUCTIONEERS OF NEW YORK, Relator, *v.* P. JOSEPH SCULLY, City Clerk of the city of New York, Defendant.

(Supreme Court, New York Special Term, June, 1898.)

Greater New York charter — Licenses to auctioneers — Corporation may be licensed — Discretion of city clerk.

Under the provisions of the Greater New York Charter (Laws of 1897, chap. 378, § 34), declaring that "The city clerk shall have authority to grant licenses to any person engaged in and carrying on the business and occupation of auctioneer", the city clerk has power to license a corporation.

The statute, however, is not mandatory; the city clerk has, under it, a right to scrutinize the qualifications of an applicant and cannot, by peremptory *mandamus*, be compelled to license a corporation, where he has no knowledge of the qualifications of the agents or servants who, under the corporation, will actually exercise the privilege.

MOTION by plaintiff for a peremptory *mandamus*, compelling the city clerk to grant to it a license to carry on the business of auctioneer within the city of New York.

Jacob A. Cantor and Edward Jacobs, for relator.

John Whalen, corporation counsel, and Charles Blandy, for defendant.

RUSSELL, J. The relator asks for a peremptory *mandamus*, compelling the city clerk to grant to it a license to carry on the business of auctioneer within the city of New York. There is little conflict over the facts. The relator is undoubtedly duly incorporated for the purpose of carrying on the business of auctioneers, and has complied with the necessary steps to obtain a license, if it has the absolute right to one. It is suggested by counsel for the city, however, that a license cannot be granted to a corporation, to perform a duty which is in the character of a service requiring the personal skill, experience and integrity of individuals known to be possessed of these qualities before the license is issued. Section 34 of the present charter of the city of New York provides as follows:

"The city clerk shall have authority to grant licenses to any person engaged in and carrying on the business and occupation of

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auctioneer * * * The president of the council, on complaint of any person having been defrauded by the auctioneer, or by the clerk, agent or assignee of such auctioneer * * * is authorized and directed to take testimony under oath relating thereto, and if the charge shall in his opinion be sustained he shall revoke the license granted to him and direct the bonds to be forfeited."

Under the general statutes of this state the term "person" includes both a natural and an artificial one. The ordinary rule of construction covers both classes, unless there is something in the statute which distinguishes between them. This rule has been carried to the extent of a determination that a statute of Wisconsin, which provides for a discharge to an insolvent debtor, who makes a general assignment for the benefit of creditors, without preference, includes a corporation under the term "person," and allowed subsequent attaching creditors to obtain preference and payment in full, to the loss of the general creditors, who by the assignment were equally treated with the attaching creditor in the directing distribution of the assets of the corporation; and this ruling was made by the Court of Appeals notwithstanding the evident purpose of the statutes of Wisconsin to apply the same to individuals only, for those statutes directed that in case of the insolvency of a corporation it should be dissolved. So that it is apparent that no discharge was provided for, or was useful, to an artificial entity about to die. Barth v. Backus, 140 N. Y. 230.

In the present instance the same view is impliedly sustained by the provision that any person who has been defrauded by the auctioneer or agents might have a remedy, and it is obvious that any corporation which employed the auctioneer would be entitled under the statute to prosecute such a complaint. I find no great difficulty, therefore, in holding that the city clerk is not inhibited from granting a license as auctioneer to a corporation under the statute.

But the question of power is a very different one from that of discretion. The statute is not mandatory upon the city clerk, but simply gives authority. It may be construed to be obligatory upon him, if it is evident that he simply acts in a ministerial capacity without power or discretion, and the circumstances or purpose of the application do not require the exercise of any discretion. Such is not this case. The position of auctioneer is a responsible one, and the execution of its duties requires both skill and integrity. The officer has a right to scrutinize the qualifications of the person ap-

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plying for a license, and may well hesitate to grant one where the personnel of the applicant is unknown except as indicated by the name of the corporation. Confessedly the corporation must act through individuals, and the city clerk has the right to fully know and understand the qualifications of the individuals who may exercise the active duties of the position; otherwise the associates in a corporation would have the privilege of secrecy and change not accorded to private persons, and the city clerk would be deprived of the most important part of the duty confided to him in respect to determination of qualifications.

This view of the discretionary rights of the city clerk is sustained by the Court of Appeals upon the construction of a similar statute giving the mayor the right to issue a license to auctioneers. People ex rel. Schwab v. Grant, 126 N. Y. 473.

The criticism of the counsel for the relator upon this case is that the mayor there had strong reasons for refusing a license on account of the character of the applicant; but this concedes the power to exercise discretion, and upon an application for a peremptory writ of *mandamus* the weight of the reasons of the officer refusing the license cannot be considered by the court.

Motion denied, with costs.

BENJAMIN B. ODELL et al., as Receiver of the Murray Hill Bank, Plaintiffs, *v.* JULIA M. CLYDE et al., Defendants.

(Supreme Court, New York Special Term, June, 1898.)

Bills and notes — Failure of a complaint to allege delivery by the maker of a note, to her own order.

A complaint, by the receivers of a bank, alleged that a note was made by the defendant, Julia M. Clyde, to her own order, that the defendant Robert J. Clyde indorsed it and that, as thus indorsed, it was delivered to the bank for value, but the complaint did not state by whom it was so delivered.

Held, on demurrer, that the complaint was sufficient, although it did not allege that Julia M. Clyde ever delivered or negotiated the note, as the allegations of the making of the note included the idea of a delivery.

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DEMURRER to complaint.

W. C. Breed, for plaintiffs.

H. B. B. Stapler, for defendants.

GILDERSLEEVE, J. The complaint sets forth the cause of action as follows, viz.: "Third. Upon information and belief that heretofore the defendant Julia M. Clyde, on or about the 9th day of July, 1896, made her promissory note in writing, dated that day, whereby, for value received, she promised and agreed to pay to the order of herself the sum of $4,925, at the Murray Hill Bank, in the city of New York, thirty days after the date thereof. Fourth. That the defendant Robert J. Clyde thereafter and before maturity, duly indorsed the said note, and, as thus indorsed, it was delivered to the said Murray Hill Bank, for value, and has come into the hands of these plaintiffs as a part of the assets of the said bank." The complaint also alleges a demand at maturity, a refusal, protest for nonpayment and due notice thereof. The defendants demur to the complaint on the ground that it does not set forth facts sufficient to constitute a cause of action, for the reason that it does not state that the note was indorsed by the maker, Julia M. Clyde, or that it was negotiated by her by delivering it for value or with intent that the same should be negotiated. By the common law a promissory note, made payable to the order of the maker, is inchoate and invalid, until it has been indorsed by the maker, when it becomes a valid promissory note, of which the indorsee is the payee; or, if no indorsee is named, it is deemed payable to bearer. See 4 Am. & Eng. Ency. of Law (2d ed.), page 120, and cases there cited. This doctrine, however, was modified by a statute (2 R. S. [9th ed.], p. 1851, § 5), which provided that "such notes, made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect, and be of the same validity, as against the maker and all persons having knowledge of the facts as if payable to bearer." Under this statute, notes payable to the order of the maker are valid without indorsement if negotiated by the maker, and are to be deemed payable to bearer; and a note may be said to be "negotiated," within the meaning of the statute, when it is delivered by the maker for a consideration or for circulation. Central Nat. Bank v. Lang, 1 Bosw. 202; Plets v. Johnson, 3 Hill, 112; Irving Bank v. Alley, 79

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N. Y. 536. The statute above set forth has been superseded by that of 1897 (chap. 612, § 320), which provides that, "where a note is drawn to the maker's own order, it is not complete until indorsed by him." But, as the transaction, which forms the subject-matter of the case at bar, took place prior to the enactment of this statute of 1897, and while the previously quoted statute was in force, the question here presented must be considered in the light of that statute. As regards both these demurrers, the only question raised is as to the sufficiency of the allegation of the complaint in respect to the delivery or negotiation of the note by the maker. As we have seen, the complaint merely shows that the note was made by Julia M. Clyde to her own order; that Robert J. Clyde indorsed it; and that, as thus indorsed, it was delivered to the Murray Hill Bank for value; but it does not state by whom it was so delivered. There is no allegation of an indorsement by Julia M. Clyde, and no allegation that the note was negotiated or delivered by her. It is perfectly true that no contract arises upon a promissory note until the delivery of the instrument, actual or constructive; and that, until such delivery, it remains revocable and unenforcible; and that a promissory note has no inception until it has been delivered by the maker to the payee. See 4 Am. & Eng. Ency. of Law (2d ed.), p. 201, and cases there cited. But the authorities hold that it is not necessary to aver the delivery of a note in the complaint, for the averment that the note was made includes the idea of a delivery, without which the making is not complete. See Daniel on Neg. Ins. (4th ed.), § 63; see, also, Russell v. Whipple, 2 Cow. 536. In the case of Peets v. Bratt, 6 Barb. 662, where the complaint alleged that on a certain day, and at a certain place, the defendant, by his promissory note in writing, for value received, promised to pay to plaintiff or bearer a specified sum, and that he had not paid the same, but was indebted, therefore, to plaintiff; it was held, on demurrer, that this was sufficient, although there was no allegation that defendant delivered the note. In the case of Erwin v. Downs, 15 N. Y. 575, the court say: "Neither the complaint, nor the findings of the referee, tells us who transferred the notes to the plaintiff. The legal presumption is that he received them from some legal holder and in course of business." We cannot assume that Julia M. Clyde put the note away in her drawer, without intention of delivering it, or that it came wrongfully into the possession of the bank. If, in point of fact, she did not deliver it, that defense can be raised by answer on the trial.

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But I am of opinion that the allegations of the complaint are sufficient, and that the demurrers should be overruled, with leave to answer within twenty days after service of notice of the entry of the order hereon.

Ordered accordingly.

HELEN S. SICKER et al., Plaintiffs, *v.* CHARLES J. SICKER et al., Defendants.

(Supreme Court, New York Special Term, June, 1898.)

Partition — Intention of testator and owner of the fee that the lands should be held — Intervention of an express trust.

The will of a testatrix provided that "When my youngest grandchild becomes of age, I do give, devise and bequeath all the rest and residue of my estate, both real and personal (which residue included certain premises here sought to be partioned), unto my seven grandchildren, to be divided between them equally, share and share alike. I do order my executor or executrix, hereinafter named, to pay unto Jennie Buhl, Freda Buhl and Dora Buhl, three of the children of my deceased daughter, Helene Buhl, formerly Bornhagen, each the sum of $5 weekly until my youngest grandchild shall become of age". This granchild was aged thirteen.

Held that an action to partition the residuary estate could not be maintained, both because it was the expressed intention of the testatrix to postpone a division until the youngest grandchild became of age, and also because the provision relative to the Buhl children created an express trust, whose purpose would be defeated if the court sanctioned a partition at the present time.

DEMURRER to complaint.

C. E. Minor, for plaintiffs.

A. Lauterbach, for defendants.

GILDERSLEEVE, J. The action is for the partition of real property, devised to the parties by the will of Dorothea Bornhagen, deceased. A demurrer is interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action. A

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copy of the will is annexed to the complaint, and forms a part thereof. The only provisions of the will that require notice on this argument are the following, viz.: "When my youngest grandchild becomes of age, I do give, devise and bequeath all the rest and residue of my estate, both real and personal (which residue includes the premises here sought to be partitioned), unto my seven grandchildren, to be divided between them equally, share and share alike. I do order my executor or executrix, hereinafter named, to pay unto Jennie Buhl, Freda Buhl and Dora Buhl, three of the children of my deceased daughter, Helene Buhl, formerly Bornhagen, each the sum of $5 weekly until my youngest grandchild shall become of age." It is stated in the complaint that the youngest grandchild is only thirteen years of age. It appears from the foregoing provisions of the will that it was the intention of the testator to postpone the partition of the residuary estate, including the premises in question, until the youngest grandchild became of age. A will should be so construed as to carry out the testator's intention, unless some positive rule contravenes, which is not the case here. See Altrock v. Vandenburgh, 54 N. Y. St. Repr. 326, Parker, J. Under these circumstances, no partition should be ordered until the time indicated in the will. See Zuenzer v. Minzenmair, 20 Misc. Rep. 212, Gaynor, J.; also Muller v. Struppman, 6 Abb. N. C. 350. It also appears that the last-above quoted provision of the will creates an express trust annexed to the office of executor. See Matter of Hecht, 71 Hun, 65. To constitute a valid express trust it is not necessary that the purpose of the trust should be stated in the precise words of the statute; it is sufficient if the intention to create the trust can be fairly collected from the instrument. See Morse v. Morse, 85 N. Y. 60; also Cahill v. Russell, 140 id. 403. A partition, as demanded by the complaint herein, would defeat the purpose of the trust, and cause a breach thereof, which the court should not sanction. See Baldwin v. Humphrey, 44 N. Y. 616; Morse v. Morse, *supra*. As it appears on the face of the complaint that the plaintiffs cannot prevail, the demurrer should be sustained and the complaint dismissed.

Demurrer sustained and complaint dismissed.

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JOHN COGAN et al., as Executors and Trustees, etc., of HENRY COGAN, Plaintiffs, *v.* ANNIE E. McCABE et al., Defendants.

(Supreme Court, New York Special Term, June, 1898.)

Contingent remainders — "Lawful heirs" — Trust — Suspension of power of alienation — Limitation of a trust upon the life of a child unborn — Substitution of a second wife and her children — Disposition of rental and fee damages as between life tenant and remaindermen — Testamentary release to trustees — Parties.

A will devised the real estate of a testator to trustees for the benefit of his wife for life and, after her death, directed a sale by the trustees and the "net proceeds of said sale to divide into four equal parts or shares", and further directed them "to pay" these to his three children or those who represented their stocks, while, in the case of the fourth share given to his son Henry, the testator directed it to be held in trust solely for Henry's wife and children "until his youngest child shall have attained the age of twenty-one years," when the share was to be equally divided among the children of Henry.

Held, that the remainders thus limited were contingent, that they did not vest until the death of the testator's wife and were then distributable to those members of the different classes who were then in existence. In the case of a son named James, who died unmarried and without issue before the testator, the will directed that, in case of the death of James before his mother, his share should pass "to his lawful heirs." Held, that as the gift was only of the proceeds of sale, "his lawful heirs" were those of his kindred or blood who took by the Statute of Distributions.

It appeared that, when the will was made, the son Henry was married and had one child; that both his wife and child died before the testator; that Henry married again; that his second wife was with child when the testator died; that Henry had two other children before the testator's widow died and that he had still another child, born a year after her death. Held, that the children of the second wife of Henry were entitled to take and that the second wife was entitled to her support from the income of the trust.

That the phrase "until his (Henry's) youngest child shall have attained the age of twenty-one years" must be taken to mean, until the youngest child of Henry, living at the time of the testator's death, had attained that age.

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That the true construction of the entire limitation was that it was dependent only upon the life of the testator's widow and the minority of that child, of Henry, who was conceived before but born after the testator's death; that, after the widow's use during life and after her death, the trust was limited for the use of Henry's second wife and her children, born or to be born during the existence of the trust, with remainder to such children, provided always that they were in existence when the trust terminated by the child of Henry, born a few months after the testator's death, reaching majority, or by the death of that child during minority.

Rental damages caused to abutting property by elevated railroads pass, so far as they accrued before the death of a life beneficiary, to her personal representatives, but those accruing after her death, and any damages to the fee, go to the remaindermen.

A provision in the will of a life beneficiary, reciting that as she herself has collected the rents of the trust estate, she releases the trustees from liability for rents not collected, does not release them from liability for rental damages, caused by elevated railroads, which neither she nor they collected.

Where the personal representatives of a life beneficiary are necessary to a final determination of an action brought by trustees, they must be brought in and the trial must stand adjourned until they have had an opportunity to plead.

ACTION for the construction of a will.

R. Dudensing, for plaintiffs.

James A. Dunn, Holt & Gaillard, John Widdecombe and Geo. W. Stake, for defendants.

COHEN, J. This action is brought by the trustees under the will of Henry Cogan to obtain a settlement of their account of their proceedings to date, and the judicial construction of the will now made necessary by the death of the testator's widow, and the partial distribution of the estate directed to be made upon the occurrence of that event.

By his will the testator, after bequeathing to his widow his "furniture, books and all other personal property," devised all his real estate, being three lots at the southwesterly corner of First avenue and East Eleventh street, in the city of New York, to his executors

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in trust to collect the rents and profits thereof, and after paying all charges for interest, taxes and insurance, to pay the net income to his wife during her life; and after her decease to sell the said real estate and "the net proceeds of said sale to divide into four equal parts or shares.

"3. To pay one share or fourth part * * * to my son James Cogan; or in the event of his death before my said wife, to his lawful heirs.

"4. To pay one share or fourth part * * * to my daughter Catherine, wife of Patrick McCabe; or, in the event of her death before my wife's death, to her surviving children, to be divided equally between the said children.

"5. To pay one share or fourth part * * * to the surviving children of my deceased daughter Mary Ann, who was the wife of Cornelius Burns, to be divided equally between said children.

"6. To invest the remaining share or fourth part of said net proceeds of said sale and to apply and pay the net income thereof towards the support and maintenance of the wife and children of my son Henry Cogan, free from his control or interference, until his youngest child shall have attained the age of twenty-one years, when the said one-fourth part is to be divided equally between the children of said Henry."

The general scheme of this will is clear and consistent. During the widow's life the testator's real estate is to be kept intact, and the rents applied to her support. Upon her death it is to be sold, the proceeds to be divided into as many shares as the testator had had children; and these children, or the persons then representing their stock, are each to receive one share, except that the son Henry was, for some reason satisfactory to the testator, set aside as the representative of his stock, and his wife and children designated as such in his stead; and the trust as to their share continued until all should be old enough to be properly intrusted with the control of their property.

To this general intention of the testator, perfectly apparent on the face of the will and a wholly competent exercise of his testamentary powers under our statute, it is the duty of the court now, if possible, to give effect. Though in any of the minor features of the scheme the testator's intentions appear in doubt or even upon the surface to be such as the law does not sanction, yet, if without violence to his language a construction can be put upon it which

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will keep him within the limits of the law and at the same time execute his "will" as he has declared it, that construction the court must adopt. The testator is presumed to have known the law, and presumed to have intended to respect it; and this latter presumption will yield only to plain evidence of the contrary in the words he has adopted. Butler v. Butler, 3 Barb. Ch. 304; Dubois v. Ray, 35 N. Y. 162; Roe v. Vingut, 117 id. 204.

When the will was executed on July 30, 1883, the testator's wife, and their sons James and Henry, and their daughter Catherine McCabe, were living. Another daughter, Mary Ann Burns, had died, leaving three children, Catherine Irene, Harry Joseph and Ellen Veronica. The son James was childless and unmarried. Henry was married to one Margaret Costello, and there was living one child of this marriage, Annie Cogan.

The testator died January 4, 1886. In the meantime his son Henry's wife and child had died; and a second wife, Georgina, was already some five months with child by him. This child, the defendant Eleanor T. Cogan, was born on the May 13th, following.

The testator's widow died March 10, 1895. By that time the son James had died, still childless and unmarried; the daughter Catherine McCabe had died, leaving four children, the defendants Annie E., Nellie G., Julia A. and Henry McCabe; and to Henry Cogan and his wife had been born, besides Eleanor T., the defendants Irene E. and Edward Cogan. They have now still another child, the defendant Henry De Witt Cogan, born since the death of testator's widow.

The first question to be determined is whether the remainders limited to the different defendants upon the life estate of testator's widow are vested or contingent. Recognizing to the full the disposition of our courts, of which the case of Hersee v. Simpson, 154 N. Y. 496, is the most recent illustration which has come to my notice, to consider no remainder a contingent one, "where, consistently with the intention of the testator, it may be construed as being vested," it is nevertheless clear that these remainders cannot be so construed. There is no gift to any of these remaindermen; only a direction to pay or divide certain sums to and among them, "after the decease of my said wife." At the death of the testator, and for some time afterwards at least, it was wholly uncertain whether the "heirs" of James Cogan, or the children of Catherine McCabe, would ever take at all. Until the death of the widow "the

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property was not even in existence in the form in which it was to reach the beneficiaries." To repeat the quotation of the Court of Appeals in Vincent v. Newhouse, 83 N. Y. 505, " we may say here, as was said by the Master of the Rolls in Hoghton v. Whitgreave, 1 Jac. & W. Ch. Rep. 146, ' not only was there no bequest before the widow's death, but the subject-matter did not then exist in the shape and form in which it is given; ' " and, it may be added, changing to the language of the Appellate Division in Geisse v. Bunce, 23 App. Div. 289, " if the rule [above referred to, for distinguishing a contingent from a vested remainder] were not applied here, it might well be thought to have no substantial existence at all."

In support of the contention of the defendant Henry Cogan for a contrary construction, reference is made by him only to the case of McGillis v. McGillis, 11 App. Div. 359. It is noteworthy that upon the appeal to the Court of Appeals in that case, that court held that " upon a proper construction of the will, the remainder was contingent and not vested." McGillis v. McGillis, 154 N. Y. 532, 543.

While these considerations perhaps apply with especial force to the remainders created in the two shares of the heirs of James Cogan and the children of Catherine McCabe, the difference in the wording of the limitations of the remaining two shares is not sufficient to permit of a different construction of them. It is clear, therefore, that no interest vested in any of the remaindermen until the death of the widow, as of which time the conversion of the real estate and the direction to divide its proceeds took effect; believing that this construction not only follows the rules of law applicable to the language employed, but is the one best adapted to carry out the actual intentions of the testator. It follows that under these remainders only those members of the different classes take who were in existence at the prescribed time of distribution. Tucker v. Bishop, 16 N. Y. 402; Teed v. Morton, 60 id. 502; Stevenson v. Lesley, 70 id. 512; Kilpatrick v. Barron, 125 id. 751.

The gift being only of the proceeds of real estate when sold, by the words the " lawful heirs " of James Cogan the testator must be held to have intended " those of his kindred or blood who took by the Statute of Distributions." Tillman v. Davis, 95 N. Y. 17; Woodward v. James, 115 id. 346; Lawton v. Corlies, 127 id. 100. The gift taking effect only on the death of the mother, the share of the son James Cogan is payable, therefore, one-third in equal shares to

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and among the four children of his sister Catharine McCabe, defendants in this action, one-third in equal shares to and among the three children of his sister Mary Ann Burns, defendants in this action, and the remaining one-third to the defendant Henry Cogan. The shares of the daughters, Catherine McCabe and Mary Ann Burns, are payable in equal shares to and among their several children respectively.

It is with reference to the disposition of the remaining share, set apart for the benefit of the wife and children of the son Henry Cogan, that the chief question in the action arises.

It is urged by certain of the parties who would benefit by such a construction, that as the wife and child of Henry Cogan, who were in existence at the time the will was executed, both died in the lifetime of the testator, this bequest lapsed *in toto*, and that for this reason as to this one-fourth share the testator died intestate. On the part of other defendants it is urged that the limitations of this share suspend its alienation, not only for the life of the widow, but for another life not in being at the death of the testator, viz., that of the youngest child of Henry Cogan, who might not be, and in fact was not, born or begotten until long afterwards; and that the same result follows as before. The counsel for the trustees, on the other hand, endeavors to save the gift by the theory that, as the testator should be held to have intended by "youngest child," "youngest child living at my death," and as there was none then living, the limitation was in fact, but for the single life of the testator's widow, upon whose death the share vested in the three children then living of Henry Cogan, to the exclusion of the fourth child, Henry De Witt Cogan, not born until a year afterwards, as well as of all possible future children.

Bearing in mind the cardinal principles before reverted to, that the testator is presumed to have known the law, and that an intention to make an illegal limitation is not to be imputed to him unless his language on the point be so unambiguous as to compel the court, however reluctantly, to recognize it as such and deal with it accordingly, there seems no great obstacle in the way of giving practically complete effect to the benevolent intentions of the testator towards the children of his son Henry and their mother. Whatever embarrassment, under the earlier cases and text-books, might be found in the way of holding the second wife of the son Henry to have been substituted, by the force of her marriage, as a legatee under the testator's will in the place of the first wife, living at the time of its

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execution, were that the bare question presented I am largely relieved from, by express evidence in this will of the testator's general intention on the subject. By providing not merely for the "child" of his son Henry in being at the date of the will, but for "the children" the son might have in time to come, the testator affirms his intention to embrace them all in his benevolence; and those born of the second wife come no less literally under the limitation than would the daughter of the first wife, had she not so speedily followed her mother to the grave. The children of the second wife being then, in my opinion, undoubtedly entitled to take, their taking seems inevitably to involve the sharing of their mother also in the testator's provision for the support of the family during their minority. For it is only for that period and while acting, as it were, as nurse for her infant brood that the testator includes her in his bounty, recognizing that during that period her presence and cooperation would be essential to the attainment of his object with regard to the infant children. In other words, the testator's intention in providing "for the support and maintenance of the wife and children of my son Henry Cogan" would have been equally well expressed by the phrase "for the support and maintenance of the children of my son Henry, including the support and maintenance of their mother so long as she shall maintain a home for them during the minority of the youngest of them."

To such a limitation, however, the objection is made that it involves a suspension of alienation during the life of the widow, and also the lives of several children not all of whom were even in being at the testator's death. But if, in the absence of evidence elsewhere of a contrary intention, we are at liberty to understand by the phrase "until his youngest child shall have attained the age of twenty-one years," "until his youngest child *living at the time of my death* shall have attained the age of twenty-one years," the objection fails; there seems to be ample authority for such a construction.

In Butler v. Butler, 3 Barb. Ch. 304, the testator gave a sum in trust to invest and pay over the income to a life-tenant "until her eldest child should arrive at the age of twenty-one years; and at that period to divide the same, as it may exist, into as many shares as there may then exist children of the said S. M. Butler, and to pay over to each child his or her share on arriving at the lawful age of twenty-one years."

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At the death of the testator the life-tenant had four children living. It was held that by the "eldest child" the testator referred to the eldest child at the time of making the codicil and not the eldest child which she might have who should attain the age of twenty-one.

"For in the last case," said the chancellor, "the power of alienation might be suspended for more than two lives in being at the death of the testator, before the contingency would happen by which the estate in remainder would vest in interest. And in the construction of wills, if the language of the testator is such that it may be construed in two different senses, one of which would render the disposition made of his property illegal and void, and the other would render it valid, the court should give that construction to his language which will make the disposition of his property effectual."

In Dubois v. Ray, 35 N. Y. 162, the testator, who left him surviving two children, gave his property to them for life, with remainder, in case they both died without issue, "to the children whom my brother, Robert Ray, and my sister, Mary King, may leave." It was considered that the remainder could only be saved by reading the words "may leave" as equivalent in intention to "may have at the time of my death;" and such was the construction adopted.

In Van Cott v. Prentice, 104 N. Y. 45, the trust deed directed distribution "when the youngest of said (three) surviving children shall come of age," a life estate for the life of the settlor having been first created; and it was held that the survivorship was "that existing at the date of the death of the settlor; and that the consequent duration of the trust is during the life of the settlor and the minority of the youngest of the three children *living at his death.*"

In Roe v. Vingut, 117 N. Y. 204, the testator provided that, "on the arrival of my youngest grandchild at the age of twenty-one years" and on the death of another life-tenant, the property should be divided. It was held that there was meant the youngest grandchild "*living at the time of my death.*"

The court said:

"If a general scheme can be found to have been intended and provided for in the instrument, and such general scheme is consistent with rules of law, and so may be declared valid, it is the duty of courts to effectuate the main purpose of the testatrix. To ac-

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complish such object the meaning of words and phrases used in some parts of the will must be diverted from that which would attach to them if standing alone, and they must be compared with other language used in other portions of the instrument, and limitations must be implied, and thus the general meaning of all the language must be arrived at * * * .

"We are impressed, in common with the courts below with the exceeding difficulty attending a construction of this will. A construction quite inconsistent with that which has been here adopted might be supported by many and weighty arguments. It would, perhaps, come as near to the intention of the testatrix as the one we have adopted. But it would also render the trust illegal and utterly destroy the provisions of the will. The construction which has been herein adopted brings us, as we think, quite as near the intention of the testatrix as the other would have done, and neither construction can be said to do violence to her intention, so far as that intention can be discovered from a most attentive examination of the instrument itself. This makes it a strong and clear case for the application of the doctrine already alluded to, and brings us to the point of adopting that construction which, while doing no violence to the intention of the testatrix, at the same time sustains the trust and the devise mentioned in the will, rather than defeats them."

The assumption of the proposition, which the foregoing cases have been cited to support, was that there were no expressions elsewhere in the will inconsistent with the construction suggested. This is not wholly true of the will in the case at bar; and it is, therefore, not altogether free from the difficulty which for the same reason the court recognized in the case last cited. To quote the language of the will once more, the limitation is "to the wife and *children* of my son Henry * * * until his youngest *child* shall have attained the age of twenty-one years." The difficulty becomes apparent when we express more fully the apparent meaning of the testator's words:

"To the wife and children of my son Henry, both those who may be living at the time of my death and any who may be subsequently born or begotten during the continuance of the trust hereby created, until the youngest of such children shall have attained the age of twenty-one years."

In order to sustain the limitation, it is evident that the words "such children" must be deprived of their ordinary function of carrying over to the second clause the significance given to the same

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words in the antecedent one, and be held instead to relate to one only of the two classes of children there described.

The Court of Appeals has recently had occasion to observe (U. S. Trust Co. v. Black, 146 N. Y. 1, 13), that "We cannot say, as a matter of law, that testators always mean precisely and definitely the same thing when they use the same expression in different parts of their wills. It is a good rule to say that generally they do. It is always, however, a question of intention." That, in the use of the phrase "such children," following a reference to children begotten both before and after the testator's death, the testator should, where otherwise his gift would fail for invalidity, be considered to intend only those begotten in his lifetime, was the exact point upon which turned the "notable case" of Mogg v. Mogg, 1 Mer. 654, cited and approved in Dubois v. Ray, *supra*. Mogg v. Mogg came before the master of the rolls in 1812, and upon a case stated by him before the King's Bench. It was elaborately argued before both courts, and both concurred in their construction of the will. In it there were a number of different limitations to be considered, only two of which need be noticed here. The testator's real estate at High Littleton he devised upon certain trusts during the life of his son, and, in default of issue of the son, "from and after the decease of the son," the testator gave and devised the principal and accumulations "unto and equally among the child and children begotten, and to be begotten on the body of his daughter, Sarah Mogg, during his, her and their life and lives; and from and after the decease of such child and children, I give and devise the same unto the lawful issue of such child and children of my said daughter, Sarah Mogg, to hold unto such issue, his, her and their heirs, as tenants in common."

Other real estate, known as the Mark estate, the testator devised in trust to, "equally pay and apply the issues and profits thereof towards the support and maintenance of the child and children begotten and to be begotten of his said daughter, Sarah Mogg, during his, her and their life and lives; and after the decease *of such children* he gave and devised the said estate to the lawful issue *of such child and children* of his said daughter, Sarah Mogg, to hold unto such issue his, her and their heirs as tenants in common without survivorship."

The son survived the testator and died without issue. At the date of the will Sarah Mogg had two children living. At the testator's death two others had been born. At the death of testator's son

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the widow during her life, and after her death for the use of the defendant Georgina T. Cogan, and her children born and to be born during the existence of the trust, with remainder to such children, contingent upon their surviving until the termination of the trust, by the defendant, Eleanor T. Cogan attaining her majority or dying during her minority. Whatever question may at one time have existed as to the validity of a limitation upon the life of an infant born after the death of the testator, but *en ventre sa mere* at the time, I understand to have been finally set at rest by the famous case of Thellusson v. Woodford, 4 Vesey, Jr., 227; 11 id. 112. There the limitation was not only upon the lives of such infants, but for the benefit of third persons; and its validity was affirmed in all the courts after exhaustive argument by most learned counsel.

A minor question is presented concerning the disposition of the net proceeds of one of the usual equity suits against the elevated railroad, in which the plaintiffs received damages for loss of rents occasioned to the trust property by the maintenance and operation of the railroad, and upon the conveyance of the easements taken were paid a further sum, supposed to represent their value. Such proportion of the net proceeds as represents rental damages which accrued before the death of the widow is payable to her executor or administrator; one-fourth of the remainder of the rental damages to the use of the defendant Georgina T. Cogan, and her children, and the remaining three-fourths, together with three-fourths of the sum representing the award for fee damages, among the representatives of the other three stocks in the same manner as their shares of the main trust fund. The remaining one-fourth of the award for fee damages constitutes a part of the fund to be held in trust during the minority of the infant, Eleanor T. Cogan. The defendants McCabe contend, however, that by the will of Mrs. Cogan, which is in evidence, she has estopped herself and her estate from claiming any portion of the proceeds of this suit. This position is not sound. Mrs. Cogan in her will, says in effect, that by arrangement with the trustees she has collected directly, instead of through them, the rents of the real property, and she, therefore, releases them from all liability for such rents as they, owing to that arrangement, did not collect. This is very far from releasing them from liability to account for certain damages in the nature of rents which not only she herself did not, but which they did, collect.

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Mrs. Cogan's personal representatives are not, however, parties to this action; and their absence is pleaded as a defense in the answer of Henry Cogan, the general legatee under her will. It is obvious that until they be brought in, the plaintiffs cannot obtain the complete discharge they seek. Their attorney may present an order providing for the issue of a supplemental summons to the executor or administrator *c. t. a.* as the case may be, requiring him to answer the complaint and the necessary supplemental complaint. Let the order recite the trial, and the conclusion of the court that without the presence of this executor or administrator a complete determination of the controversy cannot be had; and direct that the trial stand over until such executor or administrator shall have been brought in and shall have interposed his answer or demurrer. Peyser v. Wendt, 87 N. Y. 322; Hood v. Hood, 85 id. 561. Or if he shall default, or raise no issue for trial by his answer, and if none of the present defendants themselves shall by their answers to the supplemental complaint raise new issues for trial, then, upon that fact being made to appear to the court, a decision (in short form) and an interlocutory judgment may be presented for settlement, construing the will in accordance with this opinion and appointing a referee to take and state the account of the plaintiffs; upon the coming in of whose report final judgment may be entered directing distribution and settling the account of the plaintiffs, and making such award of costs as may then be considered proper. In case the plaintiffs shall fail within a reasonable time to bring in the executor or administrator *c. t. a.* of Mrs. Cogan, the parties will be heard upon the question whether the complaint should be dismissed *in toto*, without prejudice to a new suit, or whether the plaintiffs may take a judgment construing the will but refusing to take or state their account.

Ordered accordingly.

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Matter of the Application of HOYT H. FREEMAN, as Fire Marshal of the City of Syracuse, to Compel the Delivery to him of the Books, Papers and Records Belonging or Pertaining to said Office of Fire Marshal in the City of Syracuse.

(Supreme Court, Onondaga Special Term, June, 1898.)

Compulsory delivery of books to public officer — Code C. P., § 2471a.

A mayor and his clerk, in possession of books and papers pertaining to the office of a city fire marshal, illegally attempted to be removed by the mayor, whose illegal appointee resigned before actual ouster, may be compelled, under section 2471a of the Code of Civil Procedure, to surrender to the original and legal incumbent the books and papers of the office, whose key had been left with the mayor and his clerk by the illegal appointee when he resigned.

THIS is an application by the above-named Freeman under section 2471a, Code, to compel the delivery to him of the books, papers, etc., pertaining to the office of fire marshal. The application is directed against James K. McGuire, mayor of the city, and Marcus B. Rathbun, clerk in the fire marshal's office, upon the ground that they are the ones who have the possession and are refusing the delivery of said books, papers, etc.

L. L. Waters and Geo. L. Baldwin, for applicant.

James E. Newell, opposed.

HISCOCK, J. The following facts appear substantially without dispute, some of them even more plainly by the affidavits in opposition to the application than by the applicant's own petition.

On or about November 30, 1895, Hoyt H. Freeman was duly appointed fire marshal in and for the city of Syracuse, for the unexpired term of four years from June 1, 1895, and thereupon duly qualified and entered upon the discharge of his duties as such. Subsequently and on or about May 3, 1897, James K. McGuire, mayor of Syracuse, attempted to remove him from said office and made a purported appointment of one James E. Leamy to said office in his place. Shortly thereafter the said Freeman was by force excluded from his office and said Leamy obtained possession thereof and of the books and papers therein. The Appellate Division of the

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HANNAH M. COWAN, Plaintiff, *v.* ALVARADO W. COWAN, Defendant.

(Supreme Court, Onondaga Special Term, June, 1898.)

Absolute divorce — Connivance of husband.

An absolute divorce will be refused a wife, although her husband has made default, where it appears that the husband committed the compromising acts with the avowed purpose of furnishing her grounds for a divorce and by collusion with her son, who communicated the facts to her.

THIS action is brought by plaintiff to secure an absolute divorce upon the ground of the defendant's adultery. The defendant has not answered or defended.

John R. Collins, for plaintiff.

No appearance for defendant.

HISCOCK, J. The only misconduct upon the part of the defendant which has been sufficiently proved to be the basis for a judgment for divorce occurred April 17, 1898.

Before that occurrence, plaintiff's son, in pursuance of a talk with her and with a letter from her, went to see the defendant about procuring a divorce from him. Defendant asserted in that conversation that no evidence could be obtained against him which would warrant a judgment for such relief, and there was other conversation. Subsequently, he committed the acts of April 17th for the express and avowed purpose of supplying plaintiff with evidence upon which to procure her divorce, going so far as to take witnesses with him. The information of those occurrences was subsequently communicated to plaintiff through her son and the attorney named to whom she could go for the purpose of getting her divorce.

There is no question about what this court should do under such circumstances. It should deny the application for the relief demanded, as it hereby does. I do not find that the plaintiff personally has been guilty of any wrongdoing, but legally she must bear the responsibility for what her representatives have done, and there is no reasonable doubt but what her son, acting in her behalf, and the defendant, were guilty of such misconduct and collusion in the premises as to defeat her right to recover.

Ordered accordingly.

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MEMORANDA

OF

CAUSES NOT REPORTED IN FULL.

SUPREME COURT — NEW YORK SPECIAL TERM, MAY, 1898.

DAVID WILLIAMSON, Plaintiff, *v.* THE CONTINENTAL FILTER CO. et al., Defendants.

ACTION to compel the transfer by the defendant company upon its books to plaintiff of sixty-nine shares of its stock, and to issue a new certificate therefor, etc.

Clarence De Witt Rogers, for plaintiff.

Howland, Murray & Anderson, for defendants.

HISCOCK, J. The plaintiff is the holder and in possession of and produces upon the trial of this action a certificate transferring to him absolutely and as the unqualified owner, sixty-nine shares of the capital stock of the above-named defendant company, and seeks to compel said company to transfer said stock to him upon its books.

The defendants, and principally, it appears, the defendant Anderson, dispute his right to have said stock so transferred, claiming that he holds the same as security and not as an absolute owner.

A somewhat involved explanation has been offered by the evidence of the defendants to sustain such theory of security or qualified ownership. After considering the same, however, in the light of plaintiff's evidence contradicting such theory and in the light of the *prima facie* right which plaintiff has upon the face of the certificate to have it transferred to him, I am of the opinion that the latter has established his right to the relief claimed, and that he should have judgment compelling such transfer, etc.

Findings or decision and judgment in accordance herewith, with costs against both defendants, may be prepared by plaintiff, and if

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not satisfactory in form to defendants, they may submit amendments.

Ordered accordingly.

SUPREME COURT — APPELLATE TERM, MARCH, 1898.

LOUIS BECKER, Appellant, *v.* BONEY LAITIN et al., Respondents.

APPEAL from a judgment in favor of the defendants.

Emanuel Hertz, for appellant.

Max D. Steuer, for respondents.

Per Curiam. The appellant and respondents having orally agreed to dissolve their partnership on certain terms, proceeded to give effect to such agreement. The respondents delivered the notes in question to the appellant, and by an instrument in writing released the appellant from any claim they might have against him, and also assumed all of the outstanding copartnership debts. No reference was made in this instrument to the notes. It did not in fact embody the agreement of dissolution, but is to be considered as a paper given in pursuance and in part execution of that agreement. It was not error, therefore, for the trial justice to admit parol evidence showing what the terms of the original agreement of dissolution were.

The objection now raised that the defense upon which judgment was awarded in favor of the defendants was not properly pleaded is well founded, but the point was not sufficiently raised below, and the matter seems to have been litigated before the trial justice with the assent of both parties. It is evident that all the evidence which the appellant could have offered was presented, and the case was submitted to the justice by both parties upon all the proofs. Under these circumstances it is too late to raise the question on appeal.

It was doubtless error to admit the evidence which was received with respect to conversations between the witness Shultz and the defendants; but as the testimony of the witness in that regard was in all respects favorable to the appellant, the latter was in no way prejudiced, and is not, therefore, entitled to have the judgment reversed on that ground.

None of the other exceptions presents ground for reversal. The defense to the notes was good, if proven, and, as the trial justice,

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MAURO TENESEI, Appellant, *v.* SOCIETA ITALIANO ABRUZZO CITRO GABRIELE ROSETTI, Respondent.

APPEAL from a judgment of a District Court in favor of defendant.

Sewards & Sewards, for appellant.

Thomas J. Purdy, for respondent.

Per Curiam. The justice, in rendering judgment for the defendant, decided that plaintiff had failed to comply with the by-laws, and furthermore, that his sickness was not such as to prevent him from working. The return fails to show whether the by-laws of the society were admitted in evidence, but the following appears towards the end of the stenographer's minutes:

"Articles 67 and 71, and articles 80 and 82, to be looked at."

We assume from this that the said provisions were considered by both parties as having been admitted in evidence, and, therefore, a copy of the same should be annexed to the return in order that we may determine whether such finding of the justice is supported by the evidence. For these reasons a reargument must be ordered, the return to be amended meanwhile.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Reargument ordered, the return to be amended.

CHARLES E. ELLIS, Respondent, *v.* FRANK SEAMAN, Appellant.

APPEAL from a judgment in favor of plaintiff.

Percival S. Jones, for appellant.

Daniel S. Decker, for respondent.

Per Curiam. There is no question of fraud or warranty in the case. The only issue raised by the pleadings and exceptions is with respect to the terms of the contract and its performance. What the agreement was is evidenced by the written order which was given for the advertisements in question. It contained all of

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the elements of a complete contract, and, under familiar principles, cannot be enlarged or varied by parol evidence. The only matter which remains to be considered is whether there was a substantial performance with respect to the quality of the work. This was a question of fact which it was peculiarly within the province of the court below to determine, and we cannot say that such determination was so plainly against the weight of evidence as to justify us in reversing the judgment. Judgment affirmed, with costs.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Judgment affirmed, with costs.

SUPREME COURT — APPELLATE TERM, APRIL, 1898.

JOSEPH LEVENE et al., Appellants, *v.* LASCAR LASKAROPULOS et al., Respondents.

APPEAL from a judgment of the District Court of the city of New York for the second judicial district, rendered in favor of the defendants.

Abraham B. Schleimer, for appellants.

No appearance for respondents.

BEEKMAN, P. J. The sole question involved in this appeal is one of fact, and it is well settled that this court in such a case will not interfere with the determination of the trial justice unless his decision is so palpably against the weight of evidence that it would be a denial of justice to allow it to stand. Whether or not the appellants were *bona fide* holders of the note in question depended upon the credibility of witnesses which it was peculiarly within the province of the justice below to determine. In doing so, he had the advantage, which we do not possess, of observing the manner in which their testimony was given and their demeanor on the witness stand. We are, therefore, not inclined to disturb the judgment in favor of the defendant Lascaropulos, the maker of the note in suit, dismissing the complaint as to him.

It is different, however, with the defendant Weinberg, the indorser, who interposed no defense to the action, but seems, when examined as a witness, to have admitted his liability on the note.

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The judgment is, therefore, reversed as to the defendant Weinberg, and a new trial ordered, with costs to the appellants to abide the event, and affirmed as to the defendant Lascaropulos, with costs.

GILDERSLEEVE and GIEGERICH, JJ., concur.

Judgment reversed as to defendant Weinberg, and new trial ordered, with costs to appellants to abide event, and affirmed as to defendant Lascaropulos, with costs.

LEWIS GOLDFEDER, Appellant, *v.* DAVID LINCOLN, Respondent.

APPEAL by the plaintiff from an order opening a default, made by the acting justice of the Municipal Court of the city of New York, borough of Manhattan, fifth district.

The opinion states the material facts.

Leon Sanders, for appellant.

Abraham Oberstein, for respondent.

GIEGERICH, J. Without passing upon the sufficiency of the order, accompanied, as it is, by a statement of the justice's reasons for granting the same, the order must, nevertheless, be reversed, because of the omission to present an affidavit of merits. Thornall v. Turner, *ante*, p. 363.

The counsel for the defendant is in error as to the statement contained in his brief, that the order was filed on the 11th day of January, 1898. An examination of the return, on the contrary, shows that it was filed on the 10th day of January, 1898, the date mentioned in the notice of appeal. The order should, therefore, be reversed, with costs, and the motion remitted to the court below for further hearing, to be brought on, upon at least five days' notice, with leave to the defendant to file and serve an affidavit of merits.

BEEKMAN, P. J., and GILDERSLEEVE, J., concur.

Order reversed, with costs, and motion remitted to court below for further hearing, upon at least five days' notice, with leave to defendant to file and serve an affidavit of merits.

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GEORGE W. MARTIN, Respondent, *v.* CHARLES W. TARBOX, Appellant.

APPEAL from a judgment of the Tenth District Court.

R. Crawford, for respondent.

S. E. Duffey, for appellant.

Per Curiam. The judgment appealed from must be affirmed. The statute requires us to award costs where the judgment is affirmed. As both parties have appealed, it seems that while awarding costs against each, we should also provide that they be offset. Board of Supervisors v. Bristol, 58 How. Pr. 3. The judgment is, therefore, affirmed, with costs in favor of the respondent on each appeal. The order of affirmance should contain a provision for an offset of the costs. Board of Supervisors v. Bristol, 58 How. Pr. 3.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Judgment affirmed, with costs.

JOHN V. ALEXANDER, Appellant, *v.* HERMAN OETJEN, Respondent.

APPEAL from a judgment of the First District Court, dismissing complaint.

D. E. Anthony, for appellant.

Forster, Hotaling & Klenke, for respondent.

Per Curiam. The judgment appealed from is affirmed, with costs.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Judgment affirmed, with costs.

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SUPREME COURT — APPELLATE TERM, MAY, 1898.

THE MARTIN B. BROWN CO., Respondent, *v.* ARMEN YARDUM, Appellant.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, rendered in favor of the plaintiff, by the justice thereof, without a jury.

The nature of the action and the material facts are stated in the opinion.

Theodore A. Swan, for appellant.

Elek J. Ludvigh, for respondent.

Per Curiam. The only questions involved upon this appeal arise from a determination of facts upon the trial of this cause. And these were: 1. That the work was done for one D. M. Bedikian, and not the defendant. 2. That the work was defective and not worth the sum charged. The justice determined, as we assume from the judgment, that the 2,000 copies of the Armenian-English Manual or Dictionary, for the printing of which and the materials furnished therefor, this action was brought, were rendered and furnished at the request of the defendant. Although we might have arrived at a different conclusion, yet there was sufficient evidence in the case to support a finding either way, and the justice having found for the plaintiff upon a conflict of evidence, we see no reason for disturbing such determination in the absence of the elements which are requisite to a review of the facts. The justice had the witnesses before him, observed their manner of testifying, and therefore, was undoubtedly better able to judge of their credibility and of the weight to be given to their testimony than is this appellate court.

The defendant claims that the books werre imperfectly cut and bound, but having retained them after discovering such alleged defects, he is bound by his acceptance thereof, and hence is not entitled to any deduction from the price. Moreover, there was a conflict of evidence upon the question as to the cause of such imperfections, which the justice resolved in favor of the plaintiff.

For these reasons the judgment should be affirmed, with costs.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Judgment affirmed, with costs.

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HARRY COHN, Respondent, *v.* FERDINAND MARX et al., Appellants.

APPEAL by the defendants from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fourth district, rendered in favor of the plaintiff, by the justice thereof, without a jury.

Action for work, labor and services.

Ezekiel Fixman, for appellants.

A. E. Hagemann, for respondent.

Per Curiam. In support of the counterclaim for materials claimed to have been furnished by the defendants to the plaintiff, a book kept by the former, containing entries of sundry articles of merchandise, and a cash payment of $10, opposite thereto, was admitted in evidence upon the defendants' offer. The plaintiff, in rebuttal, testified that said sum was deducted from his earnings by the defendants for shoes sold and delivered, and upon his offer, certain bills rendered by the latter for such sales were admitted in evidence and marked Plaintiff's Exhibit No. 1. These bills are not attached to the return, as they should be, and hence a reargument must be ordered, the return to be amended meanwhile by annexing thereto said exhibit.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Reargument ordered, return to be amended.

MAURO TENESCI, Appellant, *v.* SOCIETA ITALIANO ABRUZZO, ETC., Respondent.

APPEAL from judgment of the First District Court of the city of New York, rendered in favor of the defendant.

Sewards & Sewards, for appellant.

Thomas J. Purdy, for respondent.

Per Curiam. The justice, in rendering judgment in favor of the defendant, made the following indorsement upon the back of the summons: "Judgment for the defendant, as he failed to

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comply with the by-laws, and further that his sickness was not such as to prevent him working." An examination of the return, as amended, discloses the fact that the by-laws upon which the justice assumed to act had never been introduced in evidence. It thus appears that the judgment was rendered upon facts not proven upon the trial. It, therefore, follows that the judgment must be reversed and a new trial ordered, with costs to the appellant to abide the event.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

SUPREME COURT — APPELLATE TERM, JUNE, 1898.

BENJAMIN FINKEL, Respondent, *v.* JOHN DAVIDSON et al., Appellants.

APPEAL from a judgment of the District Court in the city of New York for the fourth judicial district rendered in favor of the plaintiff.

Abraham H. Sarasohn, for appellants.

Jacob Rieger, for respondent.

Per Curiam. We think the justice below had no power to modify the judgment as he did, and for that reason it should be reversed. We also think that the question put to the plaintiff on cross-examination, "Didn't you know as a cloakmaker from an experience of four years when a man is hired for a certain time a writing is given, and if a writing is not given he is hired from week to week?" should have been allowed, as it had some bearing upon his credibility in view of the nature of the arrangement with the defendants to which he testified.

Judgment reversed and a new trial ordered, with costs to the appellants to abide the event.

Present: BEEKMAN, P. J., GILDERSLEEVE and GIEGERICH, JJ.

Judgment reversed and new trial ordered, with costs to appellants to abide event.

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CITY COURT OF NEW YORK — GENERAL TERM, MARCH, 1898.

THE REEDY ELEVATOR CO., Appellant, *v.* THE AMERICAN GROCERY CO., Respondent.

APPEAL from an order of the Special Term.

Henry B. Wesselman, for appellant.

Dill, Seymour & Kellogg, for respondent.

Per Curiam. Order affirmed upon the opinion of the Special Term justices.

Present: FITZSIMONS, Ch. J., and OLCOTT, J.

Order affirmed.

CITY COURT OF NEW YORK — GENERAL TERM, APRIL, 1898.

ROBERT B. SPAULDING, Respondent, *v.* JONAS G. GOLDSMITH, Appellant.

APPEAL from a judgment in favor of plaintiff and from an order denying a motion for a new trial.

Myers, Goldsmith & Bronner, for appellant.

Straley, Hasbrouck & Schloeder, for respondent.

CONLAN, J. This is an appeal by the defendant from a judgment entered in favor of the plaintiff and from an order made denying the plaintiff's motion for a new trial.

The action is based upon the allegation that the defendant is indebted to the plaintiff in the sum of $300 for work, labor and services in the sale of a certain business, known as the Goldsmith Piano and Organ Manufacturing Company; as broker in the sale thereof, which labor and services were performed by the plaintiff

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between the 1st day of March, and the 20th day of March, 1898, and for which defendant agreed to pay plaintiff the sum of $300.

The defense interposed is a general denial. We think the ruling of the court was error.

The plaintiff, to maintain his cause of action, testified, that about March, 1891, while he was in the employment of the defendant, defendant told him that if he would sell his piano business, he would pay him 10 per cent. of the amount of the selling price; that he subsequently introduced one Bridger to the defendant, and that Bridger purchased the business for $3,000. The defendant denies the agreement to pay the commission, as well as that the plaintiff procured a purchaser. It further appears that shortly after the purchase by Bridger, an action was commenced by him against the defendant to set aside the bill of sale, and that the plaintiff herein was a witness on the trial of that action.

Upon the trial of this case, and while the plaintiff was testifying in his own behalf, the following took place:

"Q. (By the Court.) What did you receive as your part of the recovery, or what, if anything, were you paid by any person for testifying in the Bridger case?

A. I was not paid anything; I received nothing.

By defendant's counsel: No person was paid for him.

Q. Directly and indirectly you did not receive a cent, nor did any one receive a cent, nor did anyone receive a cent, for what you did?

A. No, sir; but I was offered money by your client and his friend.

Q. You now mean Goldsmith?

A. Mr. Goldsmith's friend, Mr. Stone.

Q. Was Mr. Goldsmith present when it was offered you?

A. No, sir; it was in Stone's office, and I was sent for early in the morning.

Defendant's counsel.— I ask to strike out what he says in regard to a conversation with Stone.

Plaintiff's counsel.— I oppose that.

The Court.— You are testing this man's credibility. You are endeavoring to show him to be one who is testifying for money, and he has a right to testify as he does. I deny the motion."

"Defendant's counsel excepts."

The testimony as to what the plaintiff said in the absence of defendant should have been stricken out. Allowing it to remain made the calling of Stone necessary, and the interjection of a new issue in the case, as appears by the testimony subsequently offered.

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The testimony points towards bribery and corruption on the part of the defendant, and must to some extent have affected the minds of the jury.

Entertaining these views above expressed, it will not be necessary to consider the other points argued by appellant.

Judgment reversed and new trial ordered, with costs to the appellant to abide event.

FITZSIMONS, Ch. J., and O'DWYER, J., concur.

Judgment reversed and new trial ordered, with costs to the appellant to abide the event.

THE SIDNEY B. BOWMAN CYCLE CO., Respondent, *v.* ELISHA DYER, JR.; et al., Appellants.

APPEAL from an order granting a bill of particulars.

Dos Passos Bros. & Mitchell, for appellants.

Greene & Johnson, for respondent.

Per Curiam. The affidavit upon which the order herein was granted shows that Mr. Bowman, the plaintiff's president, made the lease and had personal knowledge of all the dealings between plaintiff and defendants, and that as such officer he had no knowledge or information sufficient to form a belief concerning the matters set forth in defendants' answer, and upon which they based their alleged counterclaim, and that it was necessary for him to have a bill of particulars of such counterclaim before he could frame his reply to said counterclaim. In our judgment, such affidavit was sufficient and entitled plaintiff to the order appealed from.

The order must be affirmed, with costs.

Present: FITZSIMONS, Ch. J., and O'DWYER, J.

Order affirmed, with costs.

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CITY COURT OF NEW YORK — GENERAL TERM, MAY, 1898.

BRIDGET M. KELLY, Respondent, *v.* ALICE M. THEISS, Appellant.

APPEAL from a judgment entered upon a verdict, and from an order denying a motion for a new trial.

Fromme Brothers, for appellant.

Arthur J. Westermayr, for respondent.

O'DWYER, J. The plaintiff testified that she loaned the defendant George Theiss the sum of $200 in cash upon condition that he would have the defendant Alice Theiss indorse the note in suit. That Alice Theiss did so indorse the note, and thereafter it was delivered to the plaintiff.

For the defendant it was claimed that the indorsement was procured for the purpose of enabling the plaintiff to have the note discounted, and upon an agreement that the plaintiff would not hold the defendant or enforce any liability by reason of such indorsement.

The conflict in the evidence was submitted to the jury fairly and impartially by the learned trial justice, and the jury found for the plaintiff, and that verdict is sustained by a fair preponderance of evidence.

No claim was made that the defendant Alice Theiss had received any consideration for her indorsement. That indorsement having been procured for the purpose of enabling George Theiss to obtain a credit with the plaintiff, it follows that the objection to the question "whether this defendant received any consideration for the indorsement was properly sustained."

We think that the case was properly disposed of below, and that the judgment and order appealed from should be affirmed, with costs.

SCHUCHMAN, J., concurs.

Judgment and order affirmed, with costs.

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NELLIE J. O'NEILL, Respondent, *v.* BERNARD TRAINOR, Appellant.

APPEAL from a judgment in favor of plaintiff, entered upon a verdict.

W. B. Donihee, for appellant.

Charles A. Wendell, for respondent.

Per Curiam. This action is brought to recover the sum of $675 for breach of contract of employment.

The complaint alleges that the defendant employed the plaintiff for the period commencing on February 24, 1896, and ending January 1, 1897, at $25 per week, and that on June 20, she was discharged without cause and suffered damage as stated.

The answer contains a general denial, and further alleges that plaintiff was hired for no stated time.

The testimony shows that the plaintiff upon the trial proved every material allegation of her complaint.

The defendant's evidence is to the effect that plaintiff was not employed for any stated period, and, therefore, he had a right to discharge her at any time.

That she was incompetent and careless in the performance of her duties.

The jury having found for the plaintiff, it is quite evident that they believed plaintiff's version of the transaction in question and disbelieved the defendant, which, of course, they had a perfect right to do, and now defendant asks us to set aside the verdict upon the ground that it is against the weight of evidence.

We have carefully reviewed the record presented to us, and find that the jury was fully justified in finding for the plaintiff.

We also find that there was no error committed in the admission or exclusion of evidence or in the judge's charge.

The judgment must be affirmed, with costs.

Present: FITZSIMONS, Ch. J., CONLAN and SCHUCHMAN, JJ.

Judgment affirmed, with costs.

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ANDREW D. PARKER et al., Respondents, *v.* EDWARD J. NEWELL, Appellant.

APPEAL from an order of the Special Term.

David H. Knapp, for appellant.

George A. Wingate, for respondents.

Per Curiam. The order appealed from was a just and reasonable one. All of the surrounding circumstances — the official stamp on the envelope and the time of its delivery at plaintiffs' attorney's office — show that defendant is probably mistaken when he states that the mailing occurred before midnight. Order affirmed, with costs.

Present: FITZSIMONS, Ch. J., and O'DWYER, J.

Order affirmed, with costs.

ADOLPHE HALBRAN, Respondent, *v.* ROBERT J. GRAY, Appellant.

APPEAL from a judgment entered upon a verdict in favor of the plaintiff, and from an order denying a motion for a new trial.

Jacob F. Miller, for appellant.

Jacob Halstead, for respondent.

Per Curiam. Judgment and order appealed from affirmed, with costs.

Present: O'DWYER and SCHUCHMAN, JJ.

Judgment and order affirmed, with costs.

GEORGE H. KEMFF, as Assignee, etc., Respondent, *v.* GEORGE W. MARTIN et al., Appellants.

APPEAL from an order denying a motion made by the defendants for an order of interpleader.

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Henry B. Corey, for appellants.

Julius Offenbach, for respondent.

Per Curiam. Order appealed from affirmed, with costs.

Present: McCarthy and O'Dwyer, JJ.

Order affirmed, with costs.

Frank Hardcastle, Respondent, *v.* Arnold B. Heine et al., Appellants.

Appeal from a judgment entered upon a verdict in favor of the plaintiff and from an order denying a motion for a new trial.

Charles E. Rushmore, for appellants.

Abraham Gruber (Theodore B. Chancellor, of counsel), for respondent.

Per Curiam. Judgment and order appealed from affirmed, with costs.

Present: McCarthy and O'Dwyer, JJ.

Judgment and order affirmed, with costs.

August Zinsser, Jr., as Exr., etc., Appellant, *v.* John G. Herrman et al., Respondents.

Appeal from an order.

E. O. Power, for appellant.

Benno Loewy, for respondents.

Per Curiam. The order appealed from is affirmed, with costs.

Present: Fitzsimons, Ch. J., Schuchman and Conlan, JJ.

Order affirmed, with costs.

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INDEX.

ABANDONMENT.

See **Husband and Wife.**
Lease.

ABATEMENT AND REVIVIOR.

Terms — Restoration of the case to the day calendar.— An order, reviving an action against executors, was made after due service of the papers upon them and upon the appearance of an attorney for them and from the order the executors never appealed. It granted leave to serve a supplemental complaint, but without prejudice to prior proceedings or to the position of the case on the calendar, whereon it had been reserved generally. The order did not require a new note of issue. Held, that the order was a valid exercise of the power of the court and, standing unattacked, gave the court power to restore the case to the day calendar. Hoeflin v. Gedney, 518.

ACCORD AND SATISFACTION.

Acquiescence by silence of the debtor, in the creditor's application, as in part payment, of money sent by the debtor as in full settlement.— After a dispute had arisen in regard to items of freight upon goods sold, the debtor mailed the creditor a check for a sum of money "in settlement of the accompanying bills and statement, which kindly receipt and return promptly". Five days later the creditor answered the letter, denied that the payment was in full settlement of the bills, said he had credited the check as a part payment, asked an itemized statement (including verified freight bills paid by the debtor) of items deducted in order that he might check them over, returned the bills sent and demanded payment in full. The debtor never answered this letter. Held, that the defense of an accord and satisfaction interposed to an action brought for a balance due upon the goods sold, could not be maintained. That, as no mutually satisfactory final settlement had ever been made between the parties, the creditor was entitled to infer from the debtor's failure to reply to his letter that it acquiesced in the action of the creditor in treating the check merely as a part payment. Strock v. Brigantine Transportation Co., 358.

ACCOUNT STATED.

Presentation of account.— Mere proof that a creditor had mailed certain bills, of contents not shown, to a debtor on the 1st and 15th of every month, not accompanied by any proof that the account in suit had ever been in any manner presented to him or that he had ever made any agreement to pay it, based upon presentation, is insufficient to support an action as for an account stated. New York Cab Co. v. Crow, 340.

ACCOUNTING.

See **Executors and Administrators.**

ACTIONS.

For failure to deliver tickets with coal — Laws of 1897, chapter 174.— An action for the penalty, prescribed by section 3 of chapter 174 of the Laws of 1897 for a failure to accompany the delivery of a ton of coal with the delivery tickets required by the statute, cannot be defeated by proof that the dealer delivered full weight. Mayor v. Bruns, 635.

See **Estoppel.**

AFFIDAVIT.

See **Bill of Particulars.**
Depositions.
District Courts.

AGENCY.

1. Liability of the agent of a disclosed principal where he makes

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disclosure too late.—While an agent acting for a disclosed principal, in regard to a contract connected with the subject of his agency and within the limits of his authority, is not personally liable unless he clearly indicates an intention to substitute his personal liability for or superadd it to that of his principal, he may incur personal liability where he enters into a contract, *e. g.* for the procuring by brokers of a purchaser, by exchange, of his wife's real estate — without, in the first instance disclosing his principal, and where he never discloses her interest until about the time when the final written contract between the vendor and purchaser is to be executed. Whiting v. Saunders, 382.

2. The agent cannot sell his own property to the principal.— Where a person assumes to act as an agent in the purchase of property, he cannot lawfully sell his own property to his principal, except with her knowledge and consent. Carr v. National Bank & Loan Co., 368.

See **Contract.**
Conversion.
Fraudulent Representations.

AGRICULTURAL LAW.

See **Dairy Law.**

ALIMONY.

See **Divorce.**

AMENDMENT.

See **Appeal.**

ANSWER.

See **Pleading.**

APPEAL.

1. Effectof excepting to a verdict. — Where the defendants do no act tending to waive their right to go to the jury, their exception to a verdict, directed in favor of plaintiffs, raises the point whether there were any questions for the jury. Vietor v. Nichol, 115.

2. Affirmance on a conflict of evidence.— The decision of a trial justice upon conflicting evidence must usually stand, as the Appellate Court is seldom in a position satisfactorily to review a decision where the determination rests upon a question of the credibility of the witnesses. Conroy v. Allen, 125.

3. Affirmance on a conflict of evidence.— Where the issue in a case is, whether a father, as agent for his sons, ordered certain goods, or whether he merely ordered samples from which selections could subsequently be made, and the evidence is conflicting and depends mainly upon the testimony of one witness upon each side, the decision of the trial justice should be affirmed. Bannon v. Levy, 130.

4. Excessive valuation of converted chattels.— Where the undisputed evidence as to the dilapidated condition of saloon fixtures, taken in connection with some of the chattels themselves, exhibited upon the hearing of an appeal, convinces the court that a trial justice has placed too high a value upon them, a judgment granting damages for their conversion must be reversed. Eastern Brewing Co. v. Feist, 164.

5. Affirmance on a conflict of evidence.— Where the evidence upon the question, whether certain teams were furnished by the plaintiff to the defendant or whether they were furnished to a third person, is conflicting and evenly balanced, the judgment of the trial court must be affirmed. Burkhard v. George Hagemeyer & Sons' Lumber Co., 167.

6. Open commission — Reversal refused.— An order granting an open commission affects a substantial right and is appealable; but, when granted upon the motion of the defendant, will not be reversed unless there has been a clear abuse of discretion. Burnell v. Coles, 260.

7. What orders relative to new trials are appealable to the Appellate Term.— An order of the City Court of New York denying a motion

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for a new trial, when affirmed by its General Term, is not further appealable. Only orders granting new trials and questions of law, which are raised by proper exceptions, are reviewable by the Appellate Term. Kraetzer v. Thomas, 329.

8. **Exceptions cannot be considered where the record is defective.** — The Appellate Term cannot consider exceptions, filed to findings of fact which are alleged to have been made by a justice of the Municipal Court of the city of New York, where the record does not contain his findings or decision; nor can the question of the loss of jurisdiction, through alleged illegal adjournments, be considered, where the record does not state the dates of the several adjournments nor at whose instance they were granted. Chevra Bnei, etc. v. Chevra Bikur, etc., 367.

9. **Orders appealable.**— After a justice of a District, or Municipal Court of the city of New York had opened the default of a defendant upon terms, he made a subsequent order vacating his former order and, in effect, denying the motion on the ground that the terms upon which his former order had been made had not been complied with. The defendant appealed to the Appellate Term. Held, that the appeal must be dismissed, as the statute did not authorize such an appeal but only one from an order opening a default. Schwartz v. Schendel, 476.

10. **Review of final order in summary proceedings.**— Where a review is sought of a final order in summary proceedings, the return should show all that took place before the justice prior to his signing the order, but matters which transpired thereafter cannot be considered nor be made a part of the return. Bliss v. Coryell, 477.

11. **Notice of amendment.**— A written notice that a party defeated in a Municipal Court of the City of New York "appeals to the Appellate Division of the Supreme Court of the state of New York, first judicial district" sufficiently apprises his adversary that the appeal is to the proper tribunal, the Supreme Court, and, although there is a misdescription of the particular branch of that court where the appeal may properly be heard, the adversary has not been misled and the appellant should be allowed to amend his notice by substituting the "Appellate Term" for the "Appellate Division." Clapp v. Sternglanz, 641.

12. **Appellate Term — Orders not reviewable — Remedy under Code Civ. Pro., § 3057.** The Appellate Term has no jurisdiction to entertain appeals from two orders, one made by a municipal court of the city of New York vacating a judgment against a defendant in that court, who had neither been served with the summons nor appeared voluntarily, and another order of the same court vacating the first order and denying the original motion. *Semble*, that the defendant might have been relieved by an appeal from the judgment, taken under section 3057 of the Code of Civil Procedure. Adolph v. Klein, 700.

See **Bill of Particulars.**
Costs.
Default.
Depositions.
Motions and Orders.
Stay.
Taxes.

APPELLATE DIVISION.

See **Appeal.**

APPELLATE TERM.

See **Appeal.**

ARREST.

See **Negligence.**
Undertaking.

ASSAULT AND BATTERY.

Rebuttal — Right of the defendant to show that he did not authorize threats by which his agent procured from the plaintiff a release or receipt "in full of all claims and demands."— A servant, who had brought an action against her former master for assault and battery, was allowed to prove upon the trial that when she, upon her discharge,

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signed a receipt "in full of all claims and demands," presented to her for signature at the instance of her master by a fellow servant, the latter told her, in substance, that she (the plaintiff) would be kicked off the private car, where she had been serving her master, unless she signed. The receipt had not at this time been offered in evidence, but had been pleaded by the master as a release. Held, that the court erroneously refused to allow the master to testify that he had not authorized the making of the threat, as proof of it was calculated to inflame the minds of the jury and increase the verdict against him. Delmage v. Crow, 326.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Allowance of counsel fees.— A general assignee will not be allowed counsel fees incurred for preparing schedules or for general advice and consultations, but where complicated questions arise, he is entitled to the services of counsel. Matter of Friend, 300.

2. Right of creditors to examine him as to assets claimed by him personally.— Where a general assignee, himself an attorney, seeks to withhold a sum of $350 paid him for professional services, as he testified, twelve days prior to the execution and delivery of the assignment and with knowledge that it was contemplated, objecting creditors should be permitted to show by the assignee that he never rendered any services for the sum in question. Id.

ATTACHMENT.

Papers upon.—An attachment will be sustained unless the papers clearly indicate that the plaintiff must ultimately fail. Reedy Elevator Co. v. American Grocery Co., 520.

See **Corporations.**

ATTORNEYS.

Services — Compensation — Cross-examination.— In an action brought to recover of an attorney a share of moneys which he had collected in suits brought, on behalf of the plaintiff, for the recovery of certain statutory penalties, the parties disagreed as to the defendant's compensation. He testified in regard to it, where the sum collected was $50, but the court refused to permit the plaintiff to cross-examine him as to the amount which he was to receive where less than $50 was collected. Held, that the ruling was erroneous. That, as the cross-examination related to a fact in issue and was intended to discredit the testimony of the defendant, the plaintiff had a right to pursue it. Weber v. Manheimer, 157.

AUCTIONEERS.

Greater New York charter — Licenses to — Corporation may be licensed — Discretion of city clerk.— Under the provisions of the Greater New York Charter (Laws of 1897, chap. 378, § 34) declaring that "The city clerk shall have authority to grant licenses to any person engaged in and carrying on the business and occupation of auctioneer", the city clerk has power to license a corporation. The statute, however, is not mandatory; the city clerk has, under it, a right to scrutinize the qualifications of an applicant and cannot, by peremptory mandamus, be compelled to license a corporation, where he has no knowledge of the qualifications of the agents or servants who, under the corporation, will actually exercise the privilege. People ex rel. United Auctioneers v. Scully, 732.

BANKS.

1. Imposing an individual liability upon stockholders — Constitutionality — Failure to bring a prior action against the corporation — Assets in the hands of a receiver — Statute not retroactive — Banks not of issue — Status, under the Stock Corporation Law, of different classes of creditors — Depositors, etc.— In an action begun, on March 1, 1895, by creditors to enforce, against stockholders of a state bank, the individual liability imposed by the Banking Law (Laws of 1892, chap. 689, § 52), it appeared that the bank

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had been changed from a national to a state bank, not of issue, under chapter 409 of the Laws of 1882; that it suspended in October, 1893, went into the hands of a receiver; that actions against it were enjoined, and that it was finally dissolved in December, 1893. It appeared that the receiver had unconverted assets in hand, that it was not likely that they would do more than pay the debts and that a forced sale of the assets would result in a sacrifice. Held, that the action was maintainable, as the legislature had, under the Constitution of 1846, power to alter bank charters and to impose on the stockholders of all existing banks an individual liability for their debts. That, as actions against the bank had been restrained, the provisions of the Stock Corporation Law (Laws of 1892, chap. 688, § 55), making an action and the return unsatisfied, of an execution against the corporation, condition precedents, did not apply. That, as the plaintiffs had obtained leave to sue, the action was maintainable, although the receiver had not converted all the assets into cash, as the plaintiffs had no control over the receiver and as a forced sale was to be avoided, if possible. That the Banking Law of 1892 had no retroactive effect, and could not impose upon stockholders a personal liability, which did not exist when the debt was contracted. That, while the legislature could not alter the liability of stockholders of banks of issue, fixed by the Constitution, it might alter the liability of stockholders in all other banks. It was claimed by the defendants that none of the debts of several classes of creditors were "payable within two years from the time it (the debt) is contracted," within the meaning of section 55 of the Stock Corporation Law. Held, that in the case of ordinary depositors, the insolvency of the bank dispensed with presentation, that the present action was a demand and that the deposit became forthwith due and payable, with interest from the time the bank suspended; and that a similar rule was applicable to certificates of deposit. That drafts, which the bank drew on other banks and sent to customers in payment of borrowed money, and which were protested, became thereupon debts which the bank owed the customers and were valid claims. That special deposits were subject to the same rule as to ordinary deposits. That the defendants were not liable to holders of certificates of deposit issued before the Banking Law went into effect nor to depositors, for deposits made before that date and remaining unpaid. That, in determining whether deposits, made before the Banking Law went into effect, remain unpaid, the ordinary rule relating to the application of payments should be followed. Barnes v. Arnold, 197.

2. Action against a receiver of a national bank upon an impressed trust — An attempted payment by its cashier, not executed — Preferential payment.— At half-past 3 o'clock in the afternoon of January 25, 1897, the treasurer of a church presented for payment to the cashier of a national bank certain certificates of deposit issued by it, was directed by the cashier to indorse them and had indorsed two of them, when he was called back to the cashier's window by the president who forbade payment, although the bank then had funds sufficient to pay, and thereupon the bank suspended definitely. The comptroller of the currency appointed a receiver during the next month and the present action was brought against the receiver to recover the deposit on the ground of a trust to the extent of the deposit by the agreement of the cashier to pay. The receiver demurred to the complaint. Held, that as the attempted payment was not fully executed on January 25, 1897, no fund was actually set apart for the plaintiff and that, as against the receiver, it was not entitled to any preference over other creditors; nor did it show any equities entitling it to a preferential payment. St. Mary's Church v. National Bank of Potsdam, 588.

See **Money Paid, etc.**
Negotiable Instruments.

BAR.

Severing an entire demand upon contract — Distinct causes of action arising out of the same general work.— In an action brought to recover for work and materials, ordered by the defendant's agent, it appeared that the demand in suit was upon a special contract for varnishing sash,

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cleaning woodwork and puttying up mantels throughout a building and that it was agreed that the plaintiffs might charge $4 per day for a man's labor. A former contract had existed between the same parties for painting, in the same building, a partition in the cellar and stone wall and fence, not in the original plan. Upon this contract the plaintiffs were allowed to charge $2.50 for a man's labor. The plaintiffs presented to the defendant a general account, which included the several items of the two bills, and also brought an action and recovered judgment on the bill for painting the cellar partition, the stone wall and fence. Held, that the recovery of that judgment was not a bar to the present action, as there had been no improper severance of an entire demand. That the demands arose out of separate contracts, each of which gave rise to an independent cause of action. Gentles v. Finck, 153.

See Liquor Tax Law.

BASTARDY.

1. **Bond to support a bastard — Release of father by mother.**— A release, executed by the guardian of the mother of a bastard, in terms containing a release by the mother, for a valuable consideration, of any further obligation upon the part of the father, is not a defense to him, *pro tanto*, to an action upon a bond given by him to the People for the support of the child; and the release is inadmissible in any view, as the mother is not a party to and cannot affect the bond, either in its operation, force or continuance. Mayor v. Celia, 138.

2. **Breach** — The neglect of the father to pay, according to the bond, is a breach of it, and the city need not show that it has actually paid money to support the child. Id.

BENEFIT SOCIETIES.

1. **Prima facie evidence of liability.**— Proof made in an action, brought to recover funeral benefits from a local union, that it neglected to notify the member, as required by the by-laws, that he was in arrears for two months' dues, that the moneys, non-payment of which was alleged to exclude him from being "in good standing," had been deducted by it from his sick benefit money and that the president of the union added to a guaranty of his funeral expenses the words "Late brother in full benefit," is sufficient to make out a prima facie case for a recovery. Robertson v. United Brotherhood of Carpenters and Joiners, 142.

2. **Construction of by-laws where they constitute the entire contract.** — Where the entire contract of membership is embodied in the by-laws of a benefit society, all the by-laws must be considered and a beneficiary cannot claim the benefit of any one section to the exclusion of other sections. Badesch v. Congregation Brothers of Willna, 160.

3. **By-laws limiting general benefits to members under forty-five years.**— By-laws deemed to indicate an intention that general benefits shall be enjoyed only by members under forty-five years of age. Id.

4. **Parol evidence to qualify by-laws.**— Parol evidence, as to what a member, over forty-five years of age, said when he paid money to the society and for what purpose he paid it, is inadmissible to qualify the effect of written by-laws. Id.

5. **Amendment of constitution.**— Where the constitution of a benefit membership corporation provides that it may be amended at a quarterly meeting by a two-thirds vote of the members present, and upon two weeks' previous notice in writing given at a meeting, a member is not entitled to a personal notice of the proposed amendment and is bound by an amendment which has been passed in the manner prescribed by the constitution. Talbot v. Tipperary Men National Social & Benevolent Association, 486.

6. **A provision reserving to the association the right to expend a wife's burial benefit.**— Where such a constitution, as amended, provides that "on the death of a wife of a member" there should be paid towards her burial expenses a sum fixed, the association reserving, however, the right to expend the money itself, or, in the

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other, who, up to the time of the sale, had not succeeded in procuring a purchaser. Feldman v. O'Brien, 341.

2. When acting as middlemen, they may collect commissions from both sides.— Where real estate brokers act simply as middlemen or intermediate negotiators, in order to bring the principals together and enable them to make their own bargain, the brokers may properly act for and claim commissions from both sides. Southack v. Lane, 515.

3. Commissions. —Where the communication of a real estate broker with a purchaser are the means of bringing him and the owner together and a sale results in consequence, the broker is entitled to commissions, nor can he be deprived of them by the action of the owner in subsequently taking the matter into his own hands, without terminating the agency, and selling the property to the same purchaser at a reduced price. Hobbs v. Edgar, 612.

BUILDING AND LOAN ASSOCIATIONS.

A mutual company cannot issue stock guaranteed to pay a fixed dividend — Rescission — When its receiver cannot plead ultra vires — Restoration.—A foreign building and loan association, empowered to carry on business solely upon the mutual plan, with members sharing ratably in the surplus and profits, made an agreement with the defendant, a domestic trust company, whereby it was to receive moneys paid for "trustee stock" issued by the association, declared to be full-paid, nonassessable, guaranteed to pay 6 per cent. per annum and also declared not participating in further profits or dividends. The trust company, upon its part, agreed to transfer moneys, received from the stock, to the association upon receiving from it sufficient mortgages to secure the holders of the stock and further agreed to certify, upon the certificates of stock, that it held such mortgages as security for them and for the performance of the conditions of payment entered into by the association, which contract conditions were also to be expressed upon each certificate. At a time when the association was insolvent, two other defendants, not then members of the association, purchased certificates of "trustee stock," which are still outstanding. A temporary receiver of the association, appointed after its insolvency, brought the present action to compel the trust company to surrender certain mortgages which it held for the benefit of the other defendants. The receiver did not offer to restore. Held, that the action could not be maintained. That while the association, as mutual in its character, had no authority to issue stock which was absolutely guaranteed to pay 6 per cent. and which was protected from the risks of the business, such issue was not against public policy but at most was *ultra vires* and that the receiver, who had not offered to restore, could not plead *ultra vires* in order to defraud third persons who had, in effect, purchased an interest in the mortgages held by the trust company, in reliance upon its certificate that it held them as security for the stock. Dickinson v. Continental Trust Co., 489.

CALENDAR.

1. City Court of New York — Waiver of a preference upon the calendar by a failure to demand it in time.— Service, in the City Court of New York, of a notice of trial, not accompanied by the notice of a motion for a preference upon the calendar to which the plaintiff, as an infant, deems herself entitled, constitutes a waiver of the preference. Porath v. O'Shaughnessy, 252.

2. An action for negligence cannot be placed on the short cause calendar.— An action predicated upon negligence is not entitled to a place upon the short cause calendar of the City Court of New York, as that is designed for actions on contract which can be tried within an hour. Id.

3. One who claims a statutory preference will be held to strict practice.— Where the plaintiff seeks a preference on the calendar upon the statutory ground that the sole defendant is the committee of a lunatic, strict practice must be followed and a notice that an application for the preference will be made at the opening of court must be served at the same time with

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the notice of trial. A statement, contained in a notice of trial, "that a preference is claimed herein, under section 791, subdivision 5, of the Code of Civil Procedure, on the ground that the Knickerbocker Trust Co., as the committee of the property of Mary A. Lucas, an incompetent person, is the sole defendant herein," is an insufficient compliance with section 798 of the Code of Civil Procedure. Hardy v. Knickerbocker Trust Co., 503.

See **Abatement and Revivor.**

CARRIERS.

1. **Reasonablenes of a proviso in a bill of lading that a claim for loss must be made in thirty days.**— A condition, contained in a bill of lading issued by a common carrier, and providing that "claims for loss or damage must be made in writing to the agent at the point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event," is a reasonable limitation; and where no claim for a loss, resulting from an erroneous delivery, is made by a consignor in thirty days, it is precluded from recovering against the carrier. American Grocery Co. v. Staten Island Rapid Transit Railroad Co., 356.

2. **Delivery to the carrier.**— In an action where the issue was whether the plaintiff had delivered certain goods to the defendant, an express company, it appeared that he was a regular customer, furnished with a placard which he exposed when he wished an express wagon to call and also with a book of blank receipts. After the plaintiff had exhibited his placard on a certain day, a stranger, who had the name of the company inscribed on a shield on his cap, came in the store while there was, on the other side of the street, "a sort of yellow wagon" on which the company's name appeared, signed a receipt and took away the goods. It did not appear that he came from or returned to the wagon, nor was it shown who owned the wagon. The company repudiated the whole transaction, including the name of the alleged agent as signed in the book. Held, that no delivery was made out. Abrams v. Platt, 637.

3. **Liability as warehouseman — Receipt not qualifying liability — Unexplained loss.**— A common carrier delivered to the owner, of a properly closed valise, a shipping receipt stating, among other things, "Property not removed by the person or party, entitled to receive it, within twenty-four hours after its arrival at destination, may be kept in the car, depot, or place of delivery of the carrier at the sole risk of the owner of said property." When, eighteen days after its arrival, the owner received and opened the valise, its contents were gone. The carrier offered no explanation of the loss, but showed that the valise had been carried in a sealed car, whose seals were not broken when it arrived, and that all the goods of the car were placed upon arrival on the floor of a dock, which had been well guarded. Held, that the carrier was liable as a warehouseman, for the unexplained loss. That the terms of the shipping receipt did not relieve it from its liability as a warehouseman. Aaronson v. Pennsylvania Railroad Co., 666.

CERTIORARI.

To review an assessment — Failure to give notice of the completion of the roll leaves unlimited the time within which the writ may be sought.—Where no notice of the final completion of an assessment-roll has been given as required by the Tax Law (Laws of 1896, chap. 908, § 38), the time within which an application for a writ of certiorari to review the determination may be made has not been limited. People ex rel. Swartwout v. Village of Port Jervis, 317.

CHATTEL MORTGAGE.

See **Fraudulent Conveyance.**

CITY OF AUBURN.

See **Constitutional Law.**

CITY OF HUDSON.

See **Municipal Corporations.**

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CITY OF NEW YORK.

1. Status of commissioner of water supply — Power to discharge peremptorily.— The charter of the city of New York (Laws of 1897, chap. 378, §§ 1536, 1543) empowers the commissioner of water supply, as "head" of a department, to remove, at pleasure, a foreman of repairs, transferred from a similar position in the department of public works as it existed under the old charter, who is not protected in his position by the Civil Service and Veteran Acts. People ex rel. Bowers v. Dalton, 294.

2. Charter of the Greater New York — Status of the former fire marshal of Brooklyn.— The provisions of the charter of the Greater New York (Laws of 1897, chap. 378, §§ 127, 720, 727, 779) do not, *ipso facto*, invest the fire marshal of the former city of Brooklyn, although a veteran, with title to the same office, in the new city of New York for the boroughs of Brooklyn and Queens and, it seems, at most merely make him eligible to appointment by the fire commissioner of the new city to some office in the new fire department. People ex rel. Brymer v. Gray, 602.

3. Ouster from office by the People — Judgment.— Where, in an action of ouster brought by the People, the relator shows no title to the office in question, he cannot have a judgment against the defendant even though the latter has no title. Where, however, in such an action brought partly in the interest of the relator, he fails to sustain the burden of showing title in himself, the defendant, after having shown a *prima facie* title, will be entitled to judgment, as, had he failed to show title, the People would be entitled to judgment against him, although the judgment would not proceed in the interest of the relator. Id.

See **Auctioneers.**
Constitutional Law.

CITY COURT OF NEW YORK.

See **Appeal.**
Calendar.
Service.

CIVIL SERVICE.

See **New York City.**

CLUBS.

Expulsion — Jurisdiction — Notice — Opening a sealed letter to a club president and readdressing it to one's self.— A person who joins a club presumably assents to its constitution and where this provides that a member, guilty of any conduct prejudicial to its interests, may be suspended by its directory, and may subsequently be expelled by a majority vote of the club at its next meeting, the court will not interfere with an expulsion, of whose regular proceedings the expelled member had due notice but in which he declined to participate in any manner whatever. In such a case, if there is jurisdiction, a valid by-law and no arbitrary or capricious exercise of power, the legal remedy of the person expelled is at an end. The opening of a sealed letter, addressed to the president of a club and pertaining to its business, and the destruction of the original envelope and substitution of another, so as to make it appear that the letter was addressed to the person who opened it, is a sufficient ground for expulsion. People ex rel. Elwell v. Manhattan Chess Club, 500.

CODE OF PROCEDURE.

§ 274. Knickerbocker Ice Co. v. Theiss, 625.

CODE OF CIVIL PROCEDURE.

§ 348. Daniels v. Southard, 235.
§ 382, subd. 5. East River Savings Inst. v. Barrett, 423.
§ 425. Smith v. Burliss, 544.
§ 442. Whiton v. Morning Journal Ass'n, 299.
§ 456. Oneida County Bank v. Lewis, 34.
§ 527. People v. Hall, 479.
§ 775. Mutual Life Insurance Co. v. Robinson, 563.
§ 779. Margulies v. Damrosch, 77.
§ 791, subd. 5, § 793. Hardy v. Knickerbocker Trust Co., 503.
§ 873. Bradley & Currier Co. v. Harrison, 241.

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§ 6), declaring that no person shall be deprived of "life, liberty or property without due process of law." Matter of Kenny, 9.

See **Banks.**
Railroads.

CONTEMPT.

1. Injunction pendente lite — Punishment for contempt, pending an appeal.— Quaere, whether pending an appeal from an order of injunction *pendente lite*, a violation of the order can, in the second judicial department, be punished as a contempt? A discussion of the question when a special term of that department would be justified in punishing for a contempt. New York Mail & Newspaper Transportation Co. v. Shea, 15.

2. A notary public, appointed by a foreign court a commissioner to take testimony, cannot commit a witness for refusing to answer pertinent questions.— A notary public, appointed by a District Court of a foreign state as a commissioner to take the testimony of certain witnesses resident in the state of New York, for use in the foreign court, has no power to commit for contempt a witness who, when subpoenaed to appear before the commissioner by a justice of the Supreme Court in accordance with section 915 of the Code of Civil Procedure, refused to answer pertinent questions. The power to punish for such a contempt, contained in sections 920 and 3001 of the Code of Civil Procedure, can only be exercised by a court. People ex rel. McDonald v. Leubischer, 495.

CONTRACT.

1. To procure a woman a husband, upon a consideration payable from the fruits of the marriage—Right of defrauded husband to restoration.— Proof, made in an action brought to procure the restoration of property, tending to show that, after the defendant had entered into a secret marriage brokerage contract with his cousin, payable from the fruits of the marriage, he induced the plaintiff, who was an intimate friend, to marry the cousin; that the plaintiff thereupon gave her certain money and deeded her certain property; that she thereafter gave the defendant the money and mortgaged to him the property in accordance with her prior agreement with him, entitles the plaintiff to maintain the action, as the contract of the defendant is against public policy and the plaintiff has been fraudulently deprived of his property by an immoral and illegal contract, having that result as its expressed object. Place v. Conklin, 40.

2. Services — Construction of contract.—The plaintiff, a cloak operator, and the defendants, who were manufacturers, entered into a contract for one year, under which the defendants agreed to pay the plaintiff and his finisher $20 per week, the defendants to retain any weekly excess until the contract was fully performed. Although during the seventeen weeks the plaintiff earned $181, in excess of $20 per week, he earned in the year only $895 and had been paid $1,040. Held, that he could not recover, additionally, $181. Flicker v. Graner, 112.

3. When their construction is for the court.— The construction of a contract is for the court, where its terms and language have been ascertained and there are no technical phrases nor latent ambiguities. Id.

4. Acquiescence in delay, after the time fixed for completion.— Semble, that where time is not of the essence of a contract, the assent of owners to an entire performance of a contract, after the day fixed for completion, precludes them from defeating an action for the contract price. Burke v. Educational Alliance, 163.

5. Action on a written order — Proof that the order did not contain a stipulation which the vendor's agent stated was in the order.— Where the agent of a vendor states, at the time of the execution by the vendee of a written order for a cash recorder, that the order contains a stipulation that the recorder shall be sent upon trial and may be returned if it proves unsatisfactory, the vendee is entitled, in an action brought upon the order, to show that such was the agreement and that it has been

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omitted, as he has a right to rely upon the statement of the agent. Hough Cash Recorder Co. v. Mowry, 233.

6. Entire contract, payable in installments — Measure of damages. — *Semble*, that a recovery *pro tanto* can be had on a contract to advertise a business for a year upon the payment of monthly installments, although the advertiser failed at the end of six months, it appearing that the customer had never paid any monthly installments whatever. Penniman v. LaGrange, 653.

7. When a contract is not entire. — Where an advertising contract, for placing cards in all Lenox avenue electric cars for a term of three months, provides that "the omission of any reasonable number of cards from the cars shall not constitute a violation of this contract, but the advertiser shall be entitled to a pro rata rebate for such cards as may have been omitted", the advertiser is not in a position to resist payment upon making proof that the cards were not shown in some of the Lenox avenue electric cars, as the contract cannot be deemed to be entire. Railway Advertising Co. v. Boston Dental Association, 663.

8. Performance.— An accepted proposal to paint a cottage, barn, windmill, chicken-house, and all other painting on the outside of a residence, and to do certain other interior painting for a gross sum stated, is an entire contract, and where the contractor has failed to perform in certain essential particulars, his assignee can recover nothing against the owner of the property. Pearse v. Divver, 691.

See **Benefit Societies.**
Conversion.
Corporations.
Evidence.
Municipal Corporations.
Promise.

CONVERSION.

1. A contract not creating an agency — Failure to prove a conversion.— In an action for a conversion, it appeared that, after the defendant had guaranteed to the plaintiffs sales of tobacco made and to be made by them to a third party, the litigants agreed that the third party should deliver to the defendant a certain number of cigarettes, at a price fixed per thousand, and that a part of the price per thousand should be paid to both the plaintiffs and the defendant. The defendant retained the whole sum. Held, that the contract did not constitute defendant the agent of the plaintiffs, but created only a contract liability. That the action for a conversion was not sustained by mere proof of the contract and its breach. Starr v. Silverman, 151.

2. Overpayment by an administratrix upon shares of next of kin — Right of action in her assignee — What are assets — Estoppel — Nature of the action.— In an action for a conversion brought by the assignee of an administratrix, it appeared that the defendant was an assignee of the shares of two of the next of kin of the intestate, under assignments, one of which was prior and the other subsequent to a surrogate's decree, made in the matters of the estate. The defendant assignee was a party to this decree and it fixed the amounts of the shares. Subsequently to both assignments, a second degree, to which the defendant assignee was also a party, was made, which in legal effect, declared that the value of the shares had been overestimated and that the defendant assignee had been overpaid by the administratrix for the shares, to an amount stated. The defendant, among other things, alleged that he had purchased the shares, in reliance upon the statements of the administratrix and of the next of kin that the shares were of the value fixed by the original decree; and, further, that the administratrix had not as such, nor as an individual, brought any action at law to recover the overpayments of the next of kin. Held, that the cause of action was assignable and that the plaintiff assignee had a right to enforce all the rights of the administratrix. That the recovery sought was assets of the estate, paid by a mistake, and that the administratrix might have sued for such a claim, either in her representative capacity or as an individual. That, to such an action, it was no defense that the representations of the administratrix as to the value of the shares were false, as she had no power

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to estop the estate of her intestate. That the action was not upon contract, as the payment made by the administratrix to the defendant was not voluntary, but was compelled by, and might have been enforced under, the decree. Lawyers' Surety Co. v. Reinach, 242.

3. The liability of an agent for the proceeds of goods sold on commission is upon contract only — In the absence of a prior order of arrest, a District Court of the city of New York cannot in such a case authorize an execution against the body.— An agreement, by the terms of which a person receives from time to time the goods of merchants which he is authorized to sell for their account to customers of his own finding, upon a compensation to him of a percentage of the profits upon his sales, with authority to him to collect and with a subsequent accountability for the proceeds collected, creates a fiduciary relation. The failure of the agent to account for the proceeds of his sales makes him liable to his principals in an action upon contract, but does not render him guilty of a conversion. Where the plaintiffs have not procured a prior order of arrest in such an action, proof of such an agreement and of a failure to account does not authorize a District Court of the city of New York to direct a judgment, under the Consolidation Act (Laws of 1882, chap. 410, § 1386), permitting the issue of an execution against the body of the defendant. Wright v. Duffie, 338.

4. Demand — Refusal, by requiring a receipt — Rejected tender of chattel, made after the conversion had occurred — Mitigation of damages.— In an action for a conversion it appeared that the defendant, the receiver of a firm, took possession of the plaintiff's horse because his son, who was a partner in the firm, told the defendant that it was firm property. The son afterwards told the defendant that the horse belonged to the plaintiff. The defendant, upon demand made, offered to surrender the horse to the plaintiff if he would sign a receipt for it, which stated that it was claimed by the plaintiff as his property. The plaintiff refused to sign. The defendant subsequently tendered the horse but the plaintiff declined to accept. Held, that the unauthorized dominion which the defendant exercised over the horse, however slight in extent, constituted a conversion. That the demand, necessarily made where possession had been lawfully acquired, was sufficiently refused by the defendant's insistence upon a receipt as a condition of delivering to the plaintiff his own property. That damages could not be mitigated by a tender, made after a conversion, which was not accepted. Smith v. Hartog, 353.

5. Possession gained by fraud — Demand.— The proof in an action for a conversion tended to show that the defendant had been the manager of a liquor and cigar store; that during this period his principal had bought goods of the plaintiffs which were billed and delivered to the principal's store, but were paid for by the checks of the defendant, whom the plaintiffs knew to be the manager; that after the defendant had bought out the principal he, without disclosing the change in ownership, bought the goods in question, which were billed to the principal, delivered at the same store but were never paid for by any one. One of the plaintiffs testified that they would not have sold goods to the defendant personally. Held, that the goods had never been sold to any one; that the defendant had obtained them by a fraud; that no demand of him was necessary, and that a dismissal of the complaint was erroneous. Stahl v. Dohrman, 461.

See **Corporations.**

COUNTERCLAIM.

See **Corporations.**
Negotiable Instruments.
Trustees.

COUNTY COURT.

Power, on a motion, to cancel for illegality a justice's judgment docketed in the County Court — Failure to serve the summons.— Where there is a preponderance of proof by affidavit that the summons was never served on one of the de-

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which did its first business in this state on November 24, 1896, and brought an attachment action on the contract then made upon November 15, 1897, has not, at the latter date, become liable to pay the license tax of one-eighth of one per cent. imposed upon such corporations by chapter 240 of the Laws of 1895, and hence its affidavit, for an attachment, need not allege payment of the tax and is sufficient where it gives the details of the contract and further alleges that the corporation has complied with all the requirements of the law of the state to authorize it to do business therein. Id.

7. Power of its president to contract for it.— The president and executive officer of a corporation is impliedly vested with authority to transact its ordinary business and the corporation is liable upon a contract made for it by him. Id.

8. Action for a dividend — Defenses inconsistent with admissions of the answer — Counterclaim — Pledge — Status of a dividend declared.— The complaint in an action alleged, in substance, that the defendant was a foreign corporation and had declared a certain dividend to which the plaintiff, as a stockholder of record, was entitled but that, although demanded, the dividend had not been paid to him. The answer admitted these allegations. As defenses, it further alleged first, that when the dividend was declared the plaintiff was indebted to the corporation for loans and advances and that the dividends were "placed" by the defendant to the plaintiff's credit against the loans and advances; second, that there was and is, pending between the parties, an action for an accounting in regard to certain paper fasteners, which action involved the same issues; and, third, that while the stock was on the defendant's books and in the plaintiff's name he had pledged it to the defendant and that the plaintiff subsequently assigned the stock to his wife, subject to the pledge. Held, that the first defense alleged no contract right of the defendant to apply the dividends to the loans and advances; and that the facts were not available as a counterclaim as none had been pleaded. That, as to the second defense, the present cause of action was not involved in the prior action for an accounting. That the third defense was unavailable, not only because no pledge was proved, but also because the defense was inconsistent with the prior admissions of the answer to the effect that the plaintiff owned the dividends. That a dividend declared is, in legal contemplation, severed from the assets of the corporation and is thereafter held by it as a trustee of the person who was the stockholder at the time when the dividend was declared. McGill v. Holmes, Booth & Haydens, 524.

9. Action against a trustee corporation — Conversion — Former adjudication.— In April, 1892, the United E. T. Co. guaranteed to the Mercantile Trust Co., as trustee by mortgage for certain bondholders of the Julien E. T. Co., payment of these bonds and also deposited with the Atlantic Trust Co. 30,000 shares of the stock of the Consolidated E. S. Co. as security for the guaranty. The Mercantile Trust Co., for a default in the payment of the Julien E. T. Co. bonds, subsequently foreclosed and sold under its trust mortgage and, realizing very little by the sale, demanded of the United E. T. Co. performance of its guaranty; but this was refused. In November, 1892, the Mercantile Trust Co. demanded of the Atlantic Trust Co. the shares deposited with it as security and the demand being refused, brought an action against the Atlantic Trust Co. simply to compel it to deliver the stock. The Mercantile Trust Co. succeeded in its action but, during the four years of its pendency, the stock fell in value from $4 per share to almost nothing, all of it having been sold in March, 1896, after judgment, for $2,100. Subsequently the assignee of 102 bonds of the Julien E. T. Co. brought the present action, the Mercantile Trust Co. refusing to sue against the Atlantic Trust Co. to recover damages for its alleged wrongful detention of the stock during four years and for its refusal to perform its duty as a trustee for the bondholders. The Atlantic Trust Co. pleaded in bar the former action brought against it by the Mercantile Trust Co. Held, that as the former action was merely one to compel a delivery of the stock and one in which no damages were claimed and that as the present cause of action

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was not perfected until the breach of duty upon the part of the Atlantic Trust Co. had ceased by its return, whether voluntary or compulsory, of the stock, and as it was not possible until after such return to determine definitely the extent of the injury, the former action was not a bar to the present one and could not be allowed to prevent the plaintiff from now litigating an independent phase of the subject-matter which had not been heretofore presented to the court. That the measure of damages was the difference between the value of the deposited shares at the time of their conversion in November, 1892, and that value upon their return in March, 1896, together with accrued interest for the wrongful detention. Bracken v. Atlantic Trust Co., 579.

10. Failure to furnish a verified "statement of its affairs"— Penalty — Laws of 1892, chap. 688, § 52.—The furnishing to a stockholder by the treasurer of a stock corporation of an unverified "statement of its affairs," after a demand for a statement under oath, made by the stockholder pursuant to section 52 of the Stock Corporation Law (Laws of 1892, chap. 688) and the refusal of the treasurer to furnish any other statement, although the defect was pointed out to him, subjects him to the statutory penalty of $50 for a failure to furnish a legal statement and to the further penalty of $10 for every day's neglect, in furnishing a legal statement, up to the time when an action for the penalty is begun and this, however long the stockholder may delay in bringing his action. St. John v. Eberlin, 585.

11. Permanent reorganization committee — Powers of members after a sale of their interests — Distribution of stock held by a committee in trust.— In an action by a bondholder designed to compel the present distribution of 60 per cent. of the stock of a reorganized railway company, it appeared that the stock was held and was to be held, under a bondholders' agreement and plan of reorganization, by a committee until such time, not exceeding five years from the date of the sale of the property, "as the condition of the road shall, in their judgment, warrant the distribution thereof among the bondholders." The plan further provided that the nine members of the committee should constitute the first board of directors and that, after the reorganization of the board, the directors should ex officio form the committee. Two of the committee died and five disposed of all their stock and bonds in the reorganized company. Upon a motion for an injunction, pending the action, to restrain the five members from acting and also from voting on the stock for a new board of directors, Held, that the seven living members possessed conjointly the powers given to the committee by the plan, although five of them might have disqualified themselves from becoming directors; that, as trustees, all the seven members should vote upon the stock, that the two members who had not sold their interests should be restrained from exercising the power of voting, to the exclusion of the others; and that the board thus elected would, as the reorganized board, become, by force of the agreement, ex officio the reorganization committee, with power of self perpetuation. Semble, that the present prosperity of the road afforded no valid reason for taking the road out of the hands of the committee and immediately distributing the stock. Haines v. Kinderhook & Hudson Railway Co., 605.

See **Bonds.**
Building and Loan Associations.
Indemnity.
Taxes.
Transfer Tax.
Will.

COSTS.

1. On demurrer, where an issue of fact remains to be tried — Code Civ. Pro., § 3232.— Where an issue of fact remains undisposed of after the decision, by an interlocutory judgment, of an issue of law "with costs," the successful party is not entitled to tax costs before notice of trial, but is entitled to costs after notice and before trial, to a trial fee, and to the costs of an appeal taken to the Appellate Division. Garrett v. Wood, 7.

2. Taxation.— Where an order of the Appellate Division grants specific

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motion costs, no taxation is necessary; but where it grants costs to be taxed, they are taxable by the clerk of the Supreme Court. Margulies v. Damrosch, 77.

3. **Effect of a failure to pay motion costs of an appeal.** — *Semble*, that the failure of the plaintiff to pay, in ten days from the service of a copy of the order, costs imposed by the Appellate Division upon its reversal of an order denying the defendant's motion for a commission to take testimony, operates, under section 779 of the Code of Civil Procedure, as a stay of the plaintiff's proceedings; but, in any event, the Supreme Court will not settle the interrogatories and cross-interrogatories until a disposition has been made of the question of costs. Id.

4. **Action for costs paid on an appeal from a District Court, the judgment having been reversed, with costs to abide the event — Code Civ. Pro., §§ 3047, 3060.** — Costs paid by an appellant, under section 3047 of the Code of Civil Procedure, in order to perfect an appeal from a judgment of a District Court of the City of New York cannot, upon a reversal, with costs to abide the event, of the judgment appealed from, be collected by action of the respondents to whom they have been paid by the clerk; but if the appellant ultimately succeeds in the action, it is entitled, under section 3060 of the Code of Civil Procedure, to tax the costs as necessary disbursements on appeal. Bradley Salt Co. v. Meinhold, 468.

5. **Where the plaintiff is entitled to costs against one of several defendants but not against all — Code Civ. Pro., § 3229 — Negligence as a question of fact.** — An action for alleged negligence in blasting rock, which damaged the plaintiffs, was brought to enforce the alleged joint and several liability of the defendants, who were a contractor and his subcontractor; and no relief was sought against one of them which was not claimed against the other. Both appeared by the same attorney and served joint answers, each of which was verified by both. A verdict was rendered in favor of the contractor and against the subcontractor, and thereupon the contractor entered a judgment for costs against the plaintiffs. Held, that the true intent and meaning of section 3229 of the Code of Civil Procedure was that, if one defendant united in an answer with his codefendant, or was united with him in interest, he could not recover costs, although no judgment was recovered against him, and that consequently the contractor was not entitled to costs. That, where the evidence upon a pure question of negligence was conflicting, the decision of the jury must ordinarily be final. Churchill v. Wagner, 595.

See **Assignment for Benefit of Creditors.**
Default.
District Courts.
Municipal Court of New York.

CREDITOR'S ACTION.

See **Corporations.**

CRIMINAL LAW.

1. **Statute of Limitations — Waiver.** — Where a statute has run against a crime, nothing can revive the crime, except a plea of guilty. People v. Lindenborn, 426.

2. **Where the public is excluded, there is reasonable doubt whether the accused has had a "public trial" — Applications for certificate of reasonable doubt.** — Upon the trial of an indictment for extortion, a felony, the court, a county judge, "on account of the character of the testimony which it is reasonable to expect from this case," directed and compelled the exclusion from the court-room during the trial of all persons except the parties, their attorneys and the witnesses called. Upon an exception taken to this direction, the court said that, if the defendant had any special friend whom he wished to have sit beside him during the trial, the friend might do so, and added, "but the disgusting and revolting character of the testimony which was brought out on the last trial is such that the public good requires the exclusion of all spectators during the course of the trial." Held, that as the prosecution was criminal and,

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therefore, one where under the sixth amendment of the Constitution of the United States "the accused shall enjoy the right to a speedy and public trial by an impartial jury" (Code of Crim. Pro., §§ 5 and 8), the question whether the defendant had not been deprived of his undoubted right to a "public trial" was so doubtful as to justify a justice of the Supreme Court in granting, under section 527 of the Code of Civil Procedure, a certificate that there was reasonable doubt whether the judgment should stand. That the practice, of making such an application to a justice of the Supreme Court out of the district where the trial was had, was one which should be discouraged. People v. Hall, 479.

3. Motion to set aside an indictment — Code of Crim. Pro., § 671.— In the absence of the invasion of some constitutional right of the accused, a motion to set aside an indictment cannot be based on any grounds other than those stated in section 313 of the Code of Criminal Procedure, as amended by chapter 427 of the Laws of 1897. Section 671 of said Code is merely a substitute for a *nolle prosequi* under the old practice. People v. Willis, 568.

4. Grand jury — Evidence.— The grand jury is not to be held to the same strictness, in regard to evidence, as would prevail upon a trial and ought to find an indictment, where, in their judgment, the legal evidence, if unexplained and uncontradicted, would warrant a conviction by a trial jury. Id.

5. Conspiracy — Voluntary testimony.— Where a person charged with conspiracy is called before the grand jury at his own request and earnest solicitation, he cannot subsequently insist that his constitutional rights have been invaded by his having been compelled to testify against himself. Id.

6. Time — Statute of Limitations. — The Statute of Limitations cannot avail the defendants, upon a motion to set aside an indictment for conspiracy, even if the concoction of the corrupt agreement is alleged to have taken place at a date not within two years; and such a motion certainly cannot prevail where it appears that the conspiracy was not an instantaneous crime, finished and completed at the alleged date of its concoction, but was a continuous one, existing within the two years, and in active operation as to overt acts. Id.

See **Grand Jury.**
Liquor Tax Law.
Municipal Corporations.

DAMAGES.

See **Contract.**
Conversion.
Easements.
Indemnity.
Landlord and Tenant.
Libel.
Negligence.
Patents.
Railroads.
Trade-marks.

DEED.

See **Taxes.**

DEFAULT.

1. Appeal to Appellate Term — Order opening default — Costs payable on appeal from order.— A defendant has a right to appeal from an order of a justice of a District, or Municipal, Court of the City of New York imposing terms upon opening his default and need only pay, as a condition of that right, the motion costs awarded by the order. He cannot be compelled to pay costs theretofore awarded against him in the action and whose payment formed a part of the conditions upon which his default was opened. Schwartz v. Schendel, 473.

2. Municipal Court — Order opening default must state the grounds. — An order of a justice of a District, or Municipal, Court of the City of New York opening a default, is fatally defective unless it recites and contains the grounds for the order. Popkin v. Friedlander, 475.

3. Municipal Courts of New York city — Order opening a default — Amendment.— An order of a justice of a Municipal Court of the City of

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New York, opening the plaintiff's default, must state the grounds of the order (Laws of 1896, chap. 748), but, although it fails to do so, where the return of the justice states the grounds and he further certifies that the defendant's attorney prepared and submitted the order, the Appellate Term will not reverse it, but will permit it to be amended by inserting the statement made by the justice as to the grounds upon which he proceeded. Weinstein v. Flaxman, 702.

See **Appeal.**
District Courts.

DEMURRER.

See **Costs.**
Parties.

DEPOSITIONS.

1. Examination of one expected to be made a defendant — Attempt to make a disclosure of an agency — Notes made by the principal in his own name.— Where the apparent purpose of an application, to examine a woman who is, as it is alleged, expected to be made a party defendant in an action hereafter to be brought, is to ascertain what she will swear to upon the subject of the alleged agency of her husband in making certain notes as "agent," and whether an action can successfully be maintained against her upon the theory that her husband made the notes as her agent, the application must be denied, not only because the provisions of the Code of Civil Procedure cannot be used for such a purpose, but also because she could not, in any event, be made liable as principal upon notes which her husband made and signed in his own name as agent. Matter of New York State Banking Co. v. Van Antwerp, 38.

2. Order to examine defendant to frame complaint — When refused.— An order, requiring a defendant to submit to an examination so that the plaintiff may frame his complaint, should not be allowed to stand where the moving affidavit is, without explanation, made by the attorney instead of by the plaintiff himself, where the order requires the defendant to produce books which are not shown to be in his possession nor under his control and where the plaintiff does not show that he has a cause of action. Doyle v. Kimball, 431.

3. Review by Appellate Term.— Where the requirements of the Code of Civil Procedure have been met, the Appellate Term will not review an order granting an open commission, as such an order involves the exercise of discretion upon the part of the court below. Burnell v. Coles, 615.

4. Affidavit.— Where the defendant's papers, on his application for an open commission in an action for a breach of promise of marriage, do not show that his proposed witnesses are not within the state of New York at the time when the application is made, nor explicitly allege that the witnesses are material and necessary, where the name of no witness sought to be examined is given, or any fact or circumstance set out which it is claimed will prove or tend to prove the alleged defense, an order for an open commission must be reversed. Id.

See **Contempt.**
Service.

DESCENT.

1. Statute of — Rights of collaterals of the blood of the father and that of the mother.— An intestate, who left no relatives nearer than first cousins, took a parcel of real estate from his father by descent, conveyed it to his mother for value and subsequently received it from her by devise. Held, that under the Statute of Descents (2 R. S. m. p. 752, §§ 7-12) the parcel must be deemed to have come to the intestate upon the part of his mother and would descend to those of her blood; and that the statutory provision, excluding those not of the blood of the particular ancestor, referred only to the immediate ancestor from whom the intestate received the inheritance and did not refer to a remote ancestor, who was the original source of title. Adams v. Anderson, 705.

2. Property, purchased by an intestate, by mortgaging property

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coming to him on the part of his mother.— An intestate purchased a parcel at a referee's sale and, in order to procure a part of the purchase price, mortgaged other realty which had come to him on the part of his mother. Held, that the parcel could not be deemed, to the extent of the mortgage, to have come to the intestate on the part of his mother; that, under 2 R. S., m. p. 753, § 13, it descended in equal shares to the descendants of the brothers and sisters of both the father and mother of the intestate, and that no equitable lien, to the extent of the mortgage, arose in favor of descendants, claiming as of the blood of the mother of the intestate. Id.

DAIRY LAW.

Action for a penalty for selling adulterated milk—Failure to prove a delivery.— In an action brought to recover the penalty imposed by the Agricultural Law (Laws of 1893, chap. 338, §§ 22, 26, 37, as amended by Laws of 1897, chaps. 554 and 768) for selling adulterated milk, it appeared that detectives examined the milk at 3 o'clock, a. m., at a ferry in the city of New York and found one can defective, that the defendant's driver, who was apparently merely bringing the milk from the ferry to the store of the defendant, informed him what had happened and that he immediately returned all the defective milk to the shipper by express. Held, that the action could not be maintained, as there was no proof that the defendant was delivering milk to customers when the impure milk was detected, nor that he intended to deliver it. People v. Kellina, 135.

DINGLEY ACT.

See **Ships and Shipping.**

DISCONTINUANCE.

Municipal Court of New York — Tender of undertaking to remove case to City Court — Jurisdiction — Code Civ. Pro., § 3216.— Where, in an action in a district Municipal Court of the City of New York, in which damages in excess of $100 are claimed, the defendants, i
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v. Turner, 363.

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4. Costs on rev
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tiff succeeds in reversing such an order, he is entitled to tax $30 costs. Id.

5. **Jurisdiction as to creditor's action, under Code of Civ. Pro., § 1837 — Requisites of proof.**— *Semble*, that there is grave doubt whether a District Court of the city of New York has jurisdiction to entertain an action, brought under section 1837 of the Code of Civil Procedure, by a creditor, "against the surviving husband or wife of a decedent and the next of kin of an intestate, or the next of kin of legatees of a testator, to recover, to the extent of the assets paid or distributed to them, for a debt of the decedent, upon which an action might have been maintained against the executor or administrator." Assuming that jurisdiction exists, the plaintiff must fail in his action where he has not shown that there has been any distribution of the assets of the estate of the deceased debtor, nor any payment of any portion of the same to the defendant, or that any letters of administration have ever been issued upon the estate of the deceased. Siegel v. Cohen, 365.

6. **Jurisdiction of District and Municipal Courts of New York city.**— The charter of the Greater New York, by its section 1351, particularly continues the District Courts of New York City under the name of Municipal Courts and, by its section 1352, provides that the justices, in office on January 1, 1898, shall continue for the remainder of their terms and shall be called justices of the Municipal Court. Railway Advertising Co. v. Boston Dental Association, 663.

See **Conversion.**
Restitution.
Summary Proceedings.

DIVORCE.

1. **Decree for a separation — Alimony — Prior adjudication.**— Where the Court of Appeals has declared, upon the criminal prosecution of a husband as a disorderly person for his failure to support his wife, that she has, under a decree of separation which was considered upon the appeal, a right to apply for alimony upon proof of a change in her husband's circumstances and that that right "is open to her still," the Supreme Court must accept the statement as controlling in the civil action, and, upon proof of a change in the husband's circumstances, will award her alimony, having regard, however, to the fact that the criminal prosecution proved to be groundless, and involved the husband in expense. Cullen v. Cullen, 80.

2. **Connivance of husband.**— An absolute divorce will be refused a wife, although her husband has made default, where it appears that the husband committed the compromising acts with the avowed purpose of furnishing her grounds for a divorce and by collusion with her son, who communicated the facts to her. Cowan v. Cowan, 754.

DURESS.

Pleading — Proximate cause — Acquiescence.— Duress is an affirmative defense which must be pleaded. Where it is claimed that a mother-in-law was induced to execute, as surety, a mortgage by a menace of harm to her son-in-law, the threat and its consequence must be apparent; and her acquiescence, equivalent to ratification, will prevent her subsequent repudiation. Sternback v. Friedman, 173.

EASEMENTS.

Servient to a rear house, built in part on two lots, determined by a partition of the lots among the heirs of their common owner — Right of user as an "appurtenance" — Recitals indicating a complete separation of the estate.— The owner of two lots on a city street erected thereon two buildings abutting upon the street, and in the rear thereof three buildings. The division line between the two lots passed through the middle of the center one of the three rear buildings, the water supply for which came from the street pipe through the most easterly of the two lots, its chimney being built substantially on the line between the two lots, along which line there was also built a common sewer. By conveyances executed between the heirs of this original owner, the two lots were conveyed to different parties and a subsequent purchaser of the easterly lot sawed the middle rear house through

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its centre line, removed the half part situate on his lot and erected in its place another structure, thus destroying the sewer connection of and the water supply to the west half of the middle house. In an action brought by the purchaser of the westerly lot to compel the restoration of the easterly half of the building, which had been destroyed, and for the recovery of damages occasioned by its removal, it was Held, that the owner of the easterly lot had a right to remove the portion of the building which stood thereon and to utilize it for his own purposes; that the chimney, sewer and water pipe were servient to the middle house and incidental to its use, and that the right to their user fell with the separation of the estate in the middle house. That such right of user did not constitute "an appurtenance" to the lots conveyed so as to be a common servitude for both. That this construction was supported by the fact that the conveyances were expressly made subject to the agreement of any tenant or tenants then occupying the premises, or any part thereof, indicating that the parties understood the separation of the title to each lot to be complete, as no such reservation was necessary if each half of the middle house was appurtenant to the lot on which the other half rested. Whyte v. Builders' League of New York, 385.

EJECTMENT.

Proof of right to possession.— Actual occupation, by the mesne grantor of the plaintiff in an action of ejectment, of a part of a tract of woodland under an absolute conveyance, when accompanied by acts of dominion in cultivating the cleared land and in cutting timber from the woodland, sufficiently establish a legal right of possession. Bennett v. Kovarick, 73.

ELECTIONS.

See **Villages.**

ELECTION OF REMEDIES.

As between false imprisonment and malicious prosecution.— Where a complaint contains all the allegations necessary to sustain an action for false imprisonment as well as one for malicious prosecution, the defendant may compel the plaintiff to elect upon which cause of action he intends to rely. Stokes v. Behrenes, 442.

ELECTRIC LIGHT COMPANIES.

Construction of Laws of 1890, chapter 566 — Duty of an applicant to reply when the company inquires how much light and power he wants.— Where an electric light and power company, subject to the provisions of chapter 566 of the Laws of 1890, replies to a demand, made by an owner or occupant of premises within 100 feet of its wires, that it furnish him "with electric light and power at once" by asking him, in writing, how much light and power he wants, it is his duty to answer and, failing this, he cannot successfully maintain an action against the corporation to recover of it the penalty imposed upon it by section 65 of the statute for a neglect or refusal to supply "electric light as required." Andrews v. North River Electric Light & Power Co., 512.

ESTOPPEL.

1. Action to quiet title — Estoppel by acquiescence — Possession by tenants.— In an action, brought under section 1638 of the Code of Civil Procedure, by one claiming as devisee of the fee, to quiet the title to a lot in the city of New York, it appeared that the defendant was the administrator with the will annexed of Elizabeth Carter. Under an irregular tax sale, had in 1859, Mrs. Carter became, in 1861, entitled to a tax lease for 500 years. Proof as to possession was meagre from 1861 to 1872, when Mrs. Carter leased the premises for twenty-one years to persons whose assignee took possession in 1875. While an action brought against the tenant in possession by Mrs. Carter was pending, and after 1884, she died leaving a will by which she appointed the plaintiff and another executors. They qualified and acted. In 1886 the plaintiff first learned of her rights and brought an action against the same tenant to recover the premises. In 1892 the plaintiff succeeded in her action and has

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since remained in possession by her tenants. In that action she made no mention of the tax lease of Mrs. Carter and, for this act of hostility to the estate of Mrs. Carter, the plaintiff was removed as executor, and the defendant was appointed administrator, with the will annexed. Held, that the plaintiff was not estopped from maintaining the action by her asquiescence in former years, nor by her assumption of the duties of executor of Mrs. Carter and that, at the most, her rights were merely suspended during her executorship. That, under the provisions of section 1638 of the Code of Civil Procedure, as amended in 1891, the action was maintainable by a person merely in constructive possession by tenants. Clason v. Stewart, 177.

2. Absolute devise to a person, but intended to benefit a religious order — Transfer of title to the order by the acts of the parties.— A will devised absolutely to Mary Ely, otherwise called "Mother Jerome," certain lands. It then proceeded, "My purpose in making this devise is to devote the same to the object of a hospital under the charge of the Sisters of Charity, but in expressing this purpose I do not desire to create or attempt to create any trust in law affecting said premises, willing as I am to confide unreservedly in the honor and conscience of said devisee. If said Mary Ely should happen to die before me, then I devise the same as aforesaid to the sister who may at the time of my death be at the head of St Vincent's Hospital, in the city of New York." Mary Ely who was bound, by the rules of her order, to transfer to it all gifts made to her, treated the property as belonging to the order until her death, intestate, about fourteen years later. During thirteen years immediately after the devise of the property, the order paid all the taxes imposed upon it and then procured it to be exempted from taxation as the property of their religious body, and had, when the present action in partition was brought by an heir-at-law of Mary Ely, been in possession of it for about twenty-four years. Held, that the acts of Mary Ely and those of the members of her order had given to the devise a practical construction as one made to the order, and that she and her heirs under her were now estopped from questioning the title of the order. Dunlap v. Gill, 418.

See **Conversion.**
Habeas Corpus.
Villages.

EVICTION.

See **Landlord and Tenant.**

EVIDENCE.

Failure to produce an original document — Secondary evidence.— Where a person seeking to recover a loss, evidenced only by an insurance "binder," asks to introduce an alleged copy of the "binder," he must show that he has in good faith made every reasonable effort to discover and produce the original; and those who presumptively would have possession of the paper, as well as those who at any time have seen it, should be particularly examined on the subject. Batchelor v. Hatie, 119.

2. An offer of compromise is not a proper basis of value.— An offer to compromise a claim for the use of trucks and wagons is not a proper element in reaching a conclusion as to the fair value of the use. Sipp v. Siegel-Cooper Co., 141.

3. Admissible, when completing an incomplete written contract.— Parol evidence, which is directed to the completion and sustention of a written contract in a respect in which it is incomplete, is admissible, and does not tend to avoid or alter the contract. Vogel v. Weissmann, 256.

4. Uncommunicated intention.— Evidence of the uncommunicated intention of one of the parties to a contract at the time when it was executed, is not admissible to vary its clearly expressed terms. Id.

See **Appeal.**
Bastardy.
Benefit Societies.
Criminal Law.
False representations.
Grand Jury.
Lease.
Mistake.
Negligence.
Payment.
Specific Performance.

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EXCEPTION.

See Appeal.

EXCISE.

See Liquor Tax Law.

EXECUTION.

See Conversion.
Negligence.

EXECUTORS AND ADMINISTRATORS.

1. **Payments for necessary repairs of a railroad, in part belonging to their estate — Salary of a vice-president.**— Payments made by executors for the necessary repairs of a railroad, which their testator and another person controlled and practically owned, should be allowed them, upon their accounting, as well as their payments to an officer of one of the executors, a trust company, for his services as vice-president of the railroad company, and this, although he voluntarily transferred his compensation to the trust company, as it is proper that the executors should, under the circumstances, be represented in the management and control of the corporation. Matter of Fidelity Loan, Trust & Guaranty Co., 211.

2. **Sale of stock which subsequently rose in value.**— As executors are bound by statute to proceed with diligence to pay the debts of the deceased, they are not chargeable because, in order to pay large debts of their testator, they, from time to time, during a period of fourteen months, necessarily sold dividend-paying stock of an oil company, which, subsequently and unexpectedly, doubled in value. Id.

3. **Liability upon a doubtful venture, not determined upon an intermediate accounting.**— Upon an intermediate accounting, the court will not determine the question whether executors were justified in expending moneys of their testator upon an irrigation scheme, undertaken by their testator in a foreign state, the result of which, as a venture, is still undetermined. Id.

4. **Apportionment, under Code Civ. Pro., section 2720, of the income of a trust, accruing during a part of a year.**— Rule for apportioning, under section 2720 of the Code of Civil Procedure, upon the death of the widow of a testator, the income of an estate, for a part of a year, under a will which directs that, during "two lives," his widow shall receive 90 per cent. of the corpus and his estate 10 per cent., and that, after her death, his two daughters shall each receive 45 per cent. of the income during "two lives." Apportionment of taxes paid for the whole year. Matter of Young, 223.

5. **Life-tenant and remaindermen — The savings of the life-tenant, from income, are her own property — Gains, made by her change of investments, are capital which passes to the remaindermen.**— A life-tenant given by the will of her husband all his residuary personal estate "for her sole use and benefit, and subject to her control during her natural life" is entitled to the whole income in each year, and any savings which she has made from it are her absolute personal estate. Where it appears, however, that the residuary estate was composed entirely of choses in action and that the life-tenant changed their investment to some extent, the court will, upon a contest between her next of kin and the remaindermen, in the absence of any definite proof as to the cause of an increase in the fund, ascribe it to gains made upon sales and will, therefore, award it to the remaindermen as capital. Matter of Cutler, 508.

See Conversion.
Estoppel.
Set-off.
Will.
Gift.

EXPRESS COMPANIES.

See Carriers.

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FALSE REPRESENTATIONS.

Proof.— Where proof of alleged false and fraudulent representations, which procured the plaintiff to part with his property, is made by his own testimony and that of two additional witnesses, it is erroneous for the court to dismiss the complaint upon the ground "that there was no evidence as to false and fraudulent representations." Kula v. Finer, 470.

FEES.

Several similar cases tried together — "Expenses" of the referee — Stipulation that he might "fix his own fees" — Apportionment of witnesses' fees — Copies of stenographer's minutes.— The parties to three actions of a similar nature, brought by the same plaintiff and tried together before the same referee, stipulated that the referee might "fix his own fees," that the stenographer's fees should be paid one-half by the plaintiff and one-half by the defendants, that the successful parties might tax the portion of these fees paid by them as a disbursement and further "that the evidence is to be taken as in one case and to be deemed to be taken in all of the cases so far as applicable." The referee found for the defendants in all the cases and they were represented by different attorneys. Held, that the defendants were not entitled to tax full referee's fees in each case, that the fees paid should be apportioned ratably among all the cases; but that, additionally, the referee would be entitled to fees for any labor, bestowed upon a particular case, which labor was not common to all the cases. That the referee was not entitled, in addition to his fees, to "expenses," these consisting of car fare, hotel bills, etc. That a stipulation that the referee might "fix his own fees" was not a sufficient compliance with section 3296 of the Code of Civil Procedure limiting a referee to $10 per day unless "a different rate of compensation is fixed" and that consequently he was entitled to only $10 a day. That but one set of witnesses' fees were taxable in all the cases, where witnesses were called but once and had then testified for the benefit of all the cases. That as the stipulation did not state how many copies of the stenographer's minutes should be made, and as the plaintiff's attorney had apparently acquiesced in the making of a third copy, it was taxable. Brown v. Sears, 559.

FORECLOSURE.

See **Stay.**

FORMER ADJUDICATION.

See **Corporations.**
Divorce.
Liquor Tax Law.
Replevin.
Summary Proceedings.

FRAUD.

See **Contract.**
Conversion.
Patents.
Pleading.
Principal and Surety.
Trade-marks.

FRAUDULENT CONVEYANCE.

Fraudulent transfers by insolvents for an inadequate price, paid in cash — Notice to fraudulent mortgagees.— Proof that creditors of insolvents, about to abandon business, and whose property, as the creditors were apprehensive, was liable to be attached, took from the insolvents, in consideration of an antecedent debt and of fresh money required to be paid in cash, chattel mortgages on all the available assets of the insolvents, these having a value of more than double the sum secured, that, at a sale, these creditors purchased the chattels at a wholly inadequate price and immediately opened a carriage department with the chattels, which they had hurriedly removed, sufficiently indicates that the creditors and mortgagees had notice of the illegal intent of the mortgagors, and justifies the court in vacating the chattel mortgages as constituting an attempt to reduce, pro tanto, the assets available to creditors generally and to assist the mortgagors in removing such assets beyond the

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against" the lessee.— An instrument by the terms of which a guarantor promises to pay all damages which may arise from a breach of the covenants of a lease, without notice of default, "after all means have been exhausted against" the lessee, is a guaranty of collection; and the condition of the guaranty is satisfied where the lessor recovers judgment upon a liability to him of the lessee, and issues an execution thereon which is returned unsatisfied; it being unnecessary that the lessor should proceed to supplementary proceedings. Thomas v. Risley, 109.

GUARDIANS.

See Motions and Orders.

HABEAS CORPUS.

1. **Foreign adjudication on habeas corpus — Estoppel.**—Where there is no proof of the effect, under the law of a foreign state, of a determination, there made under a writ of habeas corpus issued to procure the custody of a child, the New York rule, that such a determination is conclusive only where the facts are identical, must govern. Where the record in the foreign state is not produced in habeas corpus proceedings taken in this state, it cannot be assumed that the facts are identical and the foreign determination constitutes no estoppel to the proceedings taken in this state. People v. Dewey, 267.

2. **Writ illegally served on Sunday — Waiver.**—The foreign determination, impeachable in the interests of the child, can afford no estoppel where, contrary to the law of this and of the foreign state, the foreign writ of habeas corpus was served on Sunday. Such a defect is not waived by the appearance in the foreign court of the person in custody of the child, nor by her pleading to the writ, nor by that court's denial of a motion to quash the writ for invalidity in its service. Id.

3. **Civil status of the child established by the domicile of the divorced mother — Power of foreign court.**— Where the mother, and the actual custodian at all times of the child, has, after having procured a divorce from her husband (the relator in the present proceedings), upon the ground of abandonment (which decree made no disposition of the child), established a domicile in the state of New York and maintained the same for four years, her civil status establishes that of her child and a foreign court has no power, while she and her child are temporarily sojourning in the foreign state, to regulate the relations between them upon the return of a writ of habeas corpus procured by the present relator. Id.

HIGHWAYS.

Encroachment — Lawfully planted shade trees.— Shade trees planted, under the authority of chapter 93 of the Laws of 1863, by the owner of the fee in a highway which he has dedicated to the public and which do not encroach upon that part of the highway, which has been in public use for thirty years, do not constitute an encroachment or obstruction, within the meaning of the Highway Law (Laws of 1890, chap. 568, § 105), and their removal cannot be procured in an action brought under the statute by the town highway commissioners. The scope of this provision of the statute considered. Town of Wheatfield v. Shasley, 100.

HUSBAND AND WIFE.

Abandonment — Necessaries.— Where a husband abandons his wife and minor children and fails to support them, she has a right to bind his credit for all necessaries supplied for her and their use. Hardy v. Eagle, 441.

See Benefit Societies.

INDEMNITY.

1. **Against liability — Actual damage need not be shown.**— An agreement of indemnity against liability differs from one against loss in that, in the former case, actual damnification need not be shown, and it is enough that liability is shown to have

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been fixed, e. g., by the protest of notes which the indemnified indorser has not yet paid. Miller v. Miller Knitting Co., 404.

2. Measure of damages.— An indorser, indemnified by mortgage and who has begun its foreclosure, may recover, at the time of the decree, not only for notes, as to which his liability has become fixed before action begun, but also for all notes protested before the granting of the judgment. Id.

3. A corporate mortgage, given during insolvency but upon a promise made when solvent.— Where the president of a solvent corporation promises a person that if he will indorse its notes to a certain extent, it will give him security, its subsequent execution, when insolvent, of a mortgage to secure him for indorsements so made, is not invalid as a transfer made by a corporation in contemplation of insolvency, nor as a security given by it, when insolvent, with an intent to give a preference to any creditor over other creditors. Id.

INDICTMENT.

See **Criminal Law.**
Grand Jury.

INDORSER.

See **Negotiable Instruments.**

INJUNCTION.

See **Contempt.**
Corporations.
Nuisance.
Trademark.

INNKEEPERS.

When a person is a guest and not a boarder — Liability for unexplained loss of apparel.—A foreign army officer, who takes a room in a hotel for an indefinite time at an agreed price of one dollar and twenty-five cents per week, is a guest and not a boarder, and the hotel-keeper is liable to him for the value of wearing apparel which disappeared fr
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insurance by the name of the People's Fire Lloyds, Held, that the association was not protected by chapter 684 of the Laws of 1894 (amending section 57 of chapter 690 of the Laws of 1892, an act declaring that no association should engage as a principal in the business of insurance in this state unless possessed of the capital required of insurance corporations and unless it had made a certain deposit of securities with the state superintendent of insurance), providing that these requirements of chapter 690 of the Laws of 1892 should not apply to Lloyds associations which, on the 1st day of October, 1892, were lawfully engaged in the business of insurance within this state and which were not required to report to the state superintendent of insurance, as it was evident that insurance was only to be carried on as an actuality from the time when the original associators should separate themselves from the enterprise, and when the real insurers should take charge of the affairs of the association. People v. Loew, 574.

JUDGMENT.

See **County Court.**

JURISDICTION.

See **District Courts. Justice's Court.**

JUSTICE'S COURT.

Jurisdiction — The plaintiff, although a town constable, cannot serve a summons in his own action. — The provisions of sections 425 and 3157 of the Code of Civil Procedure forbid a party to an action to serve the summons in it, and where the summons in an action in a Justice's Court is served by the plaintiff, although a town constable, the justice acquires no jurisdiction. Smith v. Burliss, 544.

See **County Court.**

JUSTICES OF THE PEACE.

See **Constitutional Law.**

LANDLORD AND TENANT.

1. Election of landlord, excusing tenants who have held over.— Although tenants hold over the term two days, the subsequent action of the landlords in letting the premises, about fifteen days later, to a new tenant for a period of nearly a year, is an election which precludes them from subsequently recovering rent of the original tenants for an ensuing year. Goldberg v. Mittler, 116.

2. Presumption that the landlord shall pay water rents.— Where both a lease and its assignment are silent as to which party shall pay the water rents of the premises, the presumption is that the landlord must pay them, and she cannot recover them of the subtenant. Darcey v. Steger, 145.

3. Right to abandon — Waiver.— A tenant must exercise his option to abandon premises within a reasonable time and a delay of six weeks, after he discovers that the water supply is defective, is too great. Stein v. Rice, 348.

4. Constructive eviction.— Where a landlord makes no representations to his tenant in regard to the conditions of premises at a seashore resort where the entire water supply is at times inadequate, an entire failure for three days of the water supply of the premises, produced by causes over which the landlord has no control, does not amount to a constructive eviction nor justify the tenant in abandoning. Id.

5. An eviction, occurring after rent payable in advance is due, is not a defense to an action for the rent.— An eviction, which will bar an action for rent, must take place before the rent becomes due; and where the rent is payable in advance upon August 1st, a constructive eviction, caused by the failure of the water supply on August 17th, is not available as a defense. Id.

6. Action for double rent — Recovery for single rent refused.— Where a landlord is defeated in an action to recover double rent of a tenant who held over the term after having given notice to quit (1 R. S. m. p. 745, § 10), the landlord is not, under such

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complaint, entitled to recover single rent for the term during which the tenant held over. Regan v. Fosdick, 623.

7. Duty to repair — Negligence.— Where the roof of a rear one-story extension, forming a part of demised premises, has no other reason for its existence than to protect the extension, the landlord is not liable to the tenant for damages resulting to his goods, stored in the extension, from a flood which, in some unexplained manner, came through the skylight in the roof of the extension; and particularly where it appears that that roof had been constructed within seven or eight months and was not shown to have been defective. Lichtig v. Poundt, 632.

See **Lease.**
Negligence.
Pleading.
Summary Proceedings.

LEASE.

1. When the fire clause alone measures the liability of the parties—Inapplicability of Laws 1890, chapter 345.— In an action brought to recover a deposit, made by a third person to secure the performance of the conditions of a lease, it appeared that the fire clause of the lease provided "The tenant shall, in case of fire, give immediate notice thereof to the landlord, who shall thereupon cause the damage to be repaired forthwith; but if the premises be so damaged that the landlord shall decide to rebuild, the term shall cease, and the accrued rent be paid up to the time of the fire." Held, that the covenant measured the liability of the parties to the lease, and that chapter 345 of the Laws of 1860 did not apply. Nimmo v. Harway, 126.

2. Abandonment.— It further appeared that the fire, which was not the fault of the tenant, rendered the premises untenantable and that, when nine days later the landlord had made no attempt to repair, the tenant abandoned. Held, that he was justified in abandoning and that the plaintiff was entitled to the return of his deposit. Id.

3. Continued occupation by one partner does not renew the lease.— Where premises have been rented to a firm, occupation by a single partner, after the expiration of the original term, does not renew the lease nor constitute a holding over by him under it. Mason v. Tietig, 443.

4. For an indefinite term — Duration — Holding over.—A person thus in occupation of premises in the city of New York until some time in June, under an indefinite agreement as to the duration of his occupation, must, under 2 R. S., 9th ed., p. 1818, § 1, the special statute applicable to that city, be deemed entitled to a valid term until the first day of the ensuing May, and where he remains in possession after that day, the yearly letting thus created continues for another year. Id.

5. Effect of a person, not a party, signing a renewal lease — Surety.— One who signed a renewal lease in which his name was not mentioned (upon his contention, as a mere witness), cannot, in the absence of any accompanying or explanatory words, be held liable as a principal; nor as a surety, where no consideration for such an obligation is expressed in the instrument. Bernstein v. Heinemann, 464.

6. Rent payable in advance, followed by dispossession during the term.— Where rent is payable in advance, a tenant dispossessed during the month for nonpayment, is liable for the rent of the entire month. Id.

7. Deposit for security — When a counterclaim to rent due.— Where it is understood between parties that a deposit, made by the tenant, is intended to secure the landlord only for rent and for such repairs as the tenant fails to make, she may counterclaim her deposit against rent due, although the instrument, under which the deposit was made, states that the security shall "be forfeited for the nonperformance in its entirety of said lease." Id.

8. Indefinite description of premises — Parol evidence.— Where an owner leases the "westerly half" of a store of irregular shape, which widens as it deepens, and contains in

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its rear an intermediate or mezzanine floor, making there a ground floor and a gallery space, parol evidence may be given by the tenant, in proceedings taken to dispossess her, tending to show what parts of the store were, at the time when the lease was made, assigned to each party, as such testimony does not tend to vary or contradict the lease, but is, in view of the indefiniteness of the description, competent as showing the practical construction given to the lease by the acts and admissions of the parties. Freund v. Kearney, 685.

See **Landlord and Tenant.**

LEGACY.

See **Will.**

LIBEL.

1. Of one in an official employment — Privilege — Malice.— The publication by a newspaper of an article accusing an official city nurse of maltreating and neglecting infant waifs, committed to her charge as an employee of a board of charities and corrections, is not qualifiedly privileged; and hence she may recover her actual damages, although the publication was not malicious, as malice has no bearing upon the action, except upon the question of punitive damages. Ullrich v. New York Press Co., 168.

2. Malice — Damages.— Malice is a necessary element to the recovery of actual damages where the libel is qualifiedly privileged, but, in all other actions of libel and slander, it is not necessary to the recovery of actual and bears only upon punitive damages. It may be found from spite or ill will, or, failing these, if the publication is made in reckless disregard of the rights of the plaintiff or of those of other persons in general. Id.

3. Charging an editor with threatening dealers in bonds — Malice — Punitive damages — An article, shown by extrinsic evidence to have been published of the plaintiff, the editor and manager of a newspaper designed to inform investors in regard to municipal bonds, which, in substance, charges that the editor uses his newspaper to threaten, dog, spite and persecute dealers in bonds who refuse to patronize his newspaper, that he also uses it to cry down the bonds which these dealers purchase and which stigmatizes his practices as "utterly indefensible, infringing upon, if not crossing the line of downright criminality", is libelous per se, as matter of law; and, in the absence of proof of motive, justifies a recovery of punitive damages. Shanks v. Stumpf, 264.

4. An answer not alleging that the libel is true of the plaintiff — Mitigation.— An answer, which, after denying that an article was published of the plaintiff, states that "the facts forming the foundation of said alleged libel were received by the defendant in the ordinary course of business", that they were published "in the honest belief that said facts were true, and without any malice or evil design whatsoever, and defendants aver that the aforesaid article is true," does not sufficiently allege that it is true of the plaintiff and the answer is insufficient to mitigate damages. Id.

5. By publishing of a dentist that he has committed suicide.— A false publication in a newspaper, of a practicing dentist that he had committed suicide, is libelous *per se*, both as touching him in his profession and generally. Cady v. Brooklyn Union Publishing Co., 409.

6. Malice.— Malice in the defendant in speaking or publishing a slander or libel, which is not qualifiedly privileged, is not essential in order that the plaintiff may recover his actual damage. Malice in such a case has to do only with the question of smart money. Id.

7. Slander.— The difference between libel and slander pointed out; also the difference between what constitutes libel in a civil and in a criminal action. Id.

LIQUOR TAX LAW.

1. A special agent subpoenaed by a district attorney is entitled to full witness fees.— A special agent of the state excise department, ap-

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pointed under the Liquor Tax Law (Laws of 1896, chap. 112), is not bound to take any part in the prosecution by a district attorney, of an alleged violation of the statute; and, when duly subpoenaed to testify as a witness before the grand jury as to a violation which he has investigated, is entitled to his legal fees and the court will compel the proper county clerk to certify to the days of attendance and the number of miles traveled. People ex rel. Larkin v. Hull, 63.

2. A corner building used as a saloon — Measurement of 200 feet from its entrance to that of a synagogue around the corner — When a building is used "exclusively" as a church — Occupation as a saloon, prior to March 3, 1896, shown by a stipulation. — Upon an application to revoke a liquor tax certificate, it appeared that the saloon in question was on the corner of Division and Third streets and that a synagogue adjoined it on Third street. An entrance to the saloon from Third street had never been used by the licensee; he had boarded it up and had extended a portion of his bar beyond the interior opening of this entrance. The center of the main entrance on Division street, although around the corner, was within 200 feet of the center of the nearest entrance of the synagogue, when measured in a straight line. Held, that the building was within the inhibition of the statute (Laws of 1896, chap. 112, § 24, subd. 2, as amended by Laws of 1897, chap. 312). It appeared that the basement of the synagogue was rented by its trustees to five societies connected with the synagogue and largely composed of its members and that the rentals were used to maintain the synagogue. Held, that the synagogue was occupied "exclusively" as a church, within the meaning of the statute. Where the parties to such a proceeding stipulate that the premises "have been regularly licensed and occupied continuously as a saloon for the sale of liquor for a period of at least ten years," before April 6, 1898, the premises are clearly within the statutory exemption given to a place in which traffic in liquors was actually carried on, on the 3d day of March, 1896. Parties by their stipulations may make the law for any legal proceeding in which they are impleaded, which not only binds them, but which the courts are bound to enforce. Matter of McCusker, 446.

3. Imprisonment cannot be directed as an alternative for the nonpayment of a fine. — A person who has been convicted under the Liquor Tax Law cannot be imprisoned as a condition for the nonpayment of a fine imposed upon him by the court, and when confined under a sentence of such a tenor is entitled to be discharged from imprisonment. People ex rel. Langworthy v. Hazard, 477.

4. An indictment found under it may, on the application of the district attorney, be dismissed by the court, in furtherance of justice — Practice as to a nolle prosequi considered — Code of Crim. Pro., § 671. — The power and right of a district attorney to apply, under section 671 of the Code of Criminal Procedure, to the court for the dismissal of an indictment, in furtherance of justice, is, in the case of an indictment found under the Liquor Tax Law (Laws of 1896, chap. 112), neither affected nor impaired by sections 37 (as amended by Laws of 1897, chap. 312) and 38 of that statute, making it the duty of a district attorney to prosecute any person violating the statute and further declaring that "any officer who shall neglect or refuse to perform his duty under its provisions shall be liable to a penalty of $500, and if a district attorney shall be removed from office." These sections do not, by implication, repeal section 671 of the Code of Criminal Procedure. Former and present practice, relative to the entry of a nolle prosequi, considered. People v. Kurminsky, 504.

5. Application — False statement as to the number of dwellings for which consents must be filed. The Liquor Tax Law (Laws of 1896, chap. 112, § 17, subd. 8, as amended by Laws of 1897, chap. 321), does not require an applicant to state how many buildings, used exclusively as dwellings, are within the prescribed statutory distance of the proposed saloon and for which consents must be filed, and hence a false statement in the application as to the number of such buildings affords no ground for a revocation of the certificate, as the state-

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ment is not "material." Matter of Lyman, 710.

6. **Same.**— A statement, in such an application, that the applicant may "lawfully carry on such traffic in liquors on such premises" does not relate to the subject of dwelling-houses, but refers to the provisions of section 24 of the statute, prohibiting traffic in certain places. Id.

7. **Review of determination of county treasurer — Former adjudication.**— The court has power, in view of subdivision 2 of section 28 of the statute, to review and correct the action of a county treasurer in issuing a liquor tax certificate to a person who, as matter of fact, did not obtain a sufficient number of necessary consents of the owners of dwelling-houses, and hence, while this issue should in the first instance be determined by the county treasurer, his conclusion, although reached after a protest by the owners of the buildings, has not the force of a former determination, available as a bar. Id.

LIS PENDENS.

See **Mechanic's Lien.**

MALICE.

See **Libel.**

MARRIAGE.

See **Contract.**

MASTER AND SERVANT.

See **Assault and Battery.**

MECHANIC'S LIEN.

1. **Discharge of notice of lis pendens.**— The Supreme Court has no general power to discharge a notice of lis pendens filed in an action brought to foreclose a mechanic's lien; and such a motion must not only be made upon notice, but the moving party must bring the case within the terms of section 1674 of the Code of Civil Procedure and, among other things, must show that the time to appeal from the judgment has expired. Madden v. Lennon, 79.

2. **Same — Discharge of lien.**— A mechanic's lien can be discharged only in accordance with the provisions of chapter 418 of the Laws of 1897, and those of section 3417 of the Code of Civil Procedure, as amended by chapter 419 of the Laws of 1897. Id.

3. **Action by subcontractor on bond of contractors — Bar — Bond.** — After a lien filed by a subcontractor against certain premises had been discharged by a bond given to him by the contractors, the latter foreclosed their own lien and recovered against the owner a judgment, which established both liens. The owner appealed and gave security to stay execution but, before his appeal had been heard, the subcontractor brought the present action upon the bond. Held, that as the bond was given by the contractors and not by the owner, the appeal and stay, obtained by the owner, were not a bar to the present independent action against the contractor as principal debtor and against his sureties, standing as strangers to the owner. The bond executed by the contractors was conditioned to "pay any and all judgments which may be rendered against said property" in favor of the subcontractor. Held, that the bond did not contemplate an absolutely final irreversible judgment and that the judgment in the foreclosure proceedings brought by the contractors, although appealed from by the owner, was within the words of the bond. Heagney v. Hopkins, 608.

4. **Proof required of subcontractor.**— In order to recover against the owner of premises, a subcontractor must show that something was due from the owner to the principal contractor when the lien of the subcontractor was filed, or that, thereafter, a sum became due from the owner to the principal contractor, which sum was applicable to the claim of the subcontractor. Madden v. Lennon, 704.

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MISTAKE.

Reformation — Proof.— A mortgagor who seeks to reform a mortgage, as given by her mistake, and the defendant's fraud, must establish by the clearest evidence that the mistake was mutual, that a different agreement was intended by the parties, and that fraud has been exercised. Sternback v. Friedman, 173.

MONEY PAID, ETC.

Action by a bank to recover a deposit paid—Knowledge of "facts constituting the fraud" — Code Civ. Pro., § 382, subd. 5.— In an action brought by a bank to recover of the executor and trustee of S. Barrett a deposit paid, it appeared that after her grandson, Nathan B. Mundy, had become insane the plaintiff, without authority from him, changed his bank book to "in trust for S. Barrett," that it, without authority from him and with knowledge of his insanity, again changed it to the name of "S. Barrett," and in 1880 paid to her his deposit. She died in 1883. In 1895 Mundy recovered the deposit of the bank. The complaint in the present action did not allege that S. Barrett was guilty of any actual fraud in the matter, and it appeared, on the contrary, that she had fully believed herself to be entitled to the deposit, in the interests of the incompetent. An accounting was demanded. Held, that the action, whether deemed legal or equitable, was, in effect, one to recover a sum of money merely on the ground of fraud, and that as all the "facts constituting the fraud" were known to the plaintiff when it paid the deposit to S. Barrett in 1880, the action not brought within six years of that time, was barred by subdivision 5 of section 382 of the Code of Civil Procedure. East River Savings Institution v. Barrett, 423.

MOTIONS AND ORDERS.

1. Security for costs from infant plaintiff — When notice must be given to the plaintiff.— An order, made under subdivision 5 of section 3268 of the Code of Civil Procedure, permitting a defendant to require security where the plaintiff is "an infant whose guardian ad litem has not given such security," is an ex parte matter and requires no notice to the plaintiff; but where such an order is procured under section 3271 of the same Code, making security discretionary, notice must be given. Kamermann v. Eisner & Mendelson Co., 330.

2. Prior security voluntarily given by the guardian ad litem.— Where the guardian ad litem of an infant has already given security before the defendant has applied therefor under subdivision 5 of section 3268, the application must be denied and an order of the General Term of the City Court of New York, vacating an order requiring the plaintiff to give security, must be affirmed. Id.

MUNICIPAL CORPORATIONS.

1. Spoliation of city funds — A contract increasing the value of property to be taken by a city.— *Semble*, that a contract by which it is proposed that a city shall take water from a private corporation for three years, at fixed prices, and shall then acquire its franchise and plant is illegal, as the effect of the contract will be to enhance the value of the property of the corporation at the time when the city shall take it. Gleason v. Dalton, 18.

2. When competitive bidding is impossible — Determination of city official.— Although a city charter requires an expenditure, exceeding $1,000, to be made under a contract let upon sealed bids made on ten days' public notice, the rule does not apply where there is only one possible bidder; and the court has power, at the instance of a taxpayer, to inquire whether the city official, having the power to determine whether there can be more than one possible bidder, has made that determination and this, although the official is not charged with fraud or breach of his official trust. Id.

3. Assessments — Injustice in the method of laying an assessment must be attacked directly.— Injustice in the manner in which an assessment for a sewer has been laid should

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be attacked in the proceeding itself by means of a writ of certiorari, and cannot be attacked in an equitable action brought to restrain the collection of the assessment subsequently made. McKee Land & Improvement Co. v. Swikehard, 21.

4. Property benefited by a sewer. — Property which may, by laterals, be easily connected with a trunk sewer, may properly be assessed for its cost, and the fact that legislation may be necessary to the construction of the laterals does not change the rule. Id.

5. Not liable for acts of their officials in matters of governmental concern.— Municipal corporations are not liable for the acts or omissions of their officials in relation to matters of purely governmental concern. Doty v. Village of Port Jervis, 313.

6. Complaint in an action for the death of one, killed by a special policeman who is alleged to have been a dangerous character.— A complaint which alleges that the plaintiff's husband was killed at a village by its special police officer, that the officer was appointed by the president of the village, that the officer was incompetent and dangerous, that the village had actual notice of his incompetency and dangerous character and that the killing of the husband was the action of an incompetent, negligent and dangerous person, states no cause of action against the village. Id.

7. Village trustees cannot add a new name to an assessment-roll on grievance day — Waiver.— Under a village charter providing for the preparation, in the first instance, by the town clerk of an assessment-roll and for its subsequent correction by the board of trustees, under powers similar to those enjoyed by boards of supervisors, the trustees have no power, upon grievance day, to enter upon the roll an assessment for personal property against a person whose name was not then on it but who, having heard that he was to be assessed, voluntarily appeared before the trustees and submitted to an examination relative to his personal property. People ex rel. Swartwout v. Village of Port Jervis, 317.

8. Violation of a city charter — When punishable criminally only. — A violation of a city ordinance made punishable by a maximum fine, or in the alternative, by certain imprisonment, is properly prosecuted as a crime, and the fact that the charter permits the common council to sue, in the name of the city, any person violating any city ordinance "to recover the penalties therein prescribed," does not change the character of the proceeding from criminal to civil. Such a construction is particularly proper where the entire proceeding has been conducted according to criminal procedure. City of Hudson v. Granger, 401.

9. Compulsory delivery of books to public officer.— Code Civ. Pro., § 2471a.— A mayor and his clerk, in possession of books and papers pertaining to the office of a city fire marshal, illegally attempted to be removed by the mayor, whose illegal appointee resigned before actual ouster, may be compelled, under section 2471a of the Code of Civil Procedure, to surrender to the original anl legal incumbent the books and papers of the office, whose key had been left with the mayor and his clerk by the illegal appointee when he resigned. Matter of Freeman, 752.

See **Taxes.**

MUNICIPAL COURT OF NEW YORK.

A nonresident may proceed by long summons — Costs.— A domestic corporation, having its place of business in a county other than New York and therefore a nonresident of that county, is not bound to proceed in the Municipal Court of that city by a short summons, accompanied by security for costs (Laws of 1882, chap. 410, § 1299), but may proceed by long summons, in which case it cannot be required to give security. Titus Sheard Co. v. Morrissey, 122.

See **Default.**
Discontinuance.
District Courts.

NEGLIGENCE.

1. Verdict for $15,000 in favor of an infant sustained.— A verdict for

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$15,000 rendered against a street railroad corporation in favor of a boy eighteen months old who, by its negligence, lost his leg below the knee, will not be set aside as excessive. Kalfur v. Broadway Ferry & Metropolitan Avenue R. Co., 417.

2. A person injured in an auction-room by the act of a third party.— The proprietor of a public auction-room is not liable to an intending bidder who, while standing in the room with her back to three tables placed on top of each other, was injured because a stranger, while handling the uppermost table, permitted it to fall upon the bidder. Geelan v. Cooke, 460.

3. Action for the death of a street car driver, killed by the breaking of defective harness — His duty to inspect the harness — When the master's duty of inspection cannot be delegated.— The lower hamestrap of the harness of a street car horse broke in its crease on the ring or eye of the hame where it had become worn and cracked on the inside, the freed harness then slipped off the back of the horse, he pulled the driver over the dashboard to the ground by means of the lines and the driver was then run over and killed by the car. The "head changer" of the corporation who operated the car, and his assistants were charged with the duty of inspecting the harness in detail and there was an ample supply of new hamestraps on hand. A rule of the corporation read: "They (drivers) will also examine the harness"; but horses were brought to the cars harnessed and drivers started off at once or very soon. In an action brought against the corporation by the administratrix of the driver, to recover damages for his death, the jury found that, had the "head changer" and his assistants done their duty, they could not have missed the defect, but further found that, in the short time given the driver for inspection, he could not be expected to have seen it; it apparently not being visible when the harness was on the horse and the hamestrap buckled tight. Held, that the contributory negligence of the driver was properly submitted to the jury, as the question of the extent of the examination of the harness which it was possible for him to make in the short time allotted to him, was one of fact. That the corporation could not delegate the duty of inspection to the "head changer" and his assistants, although competent persons, and that, as the jury had found that that duty had not been properly performed, the corporation was liable; and that the doctrine of the negligence of fellow-servants had no application to such a state of facts. McKnight v. Brooklyn Heights Railroad Co., 527.

4. Failure of landlord to protect tenant, while putting on a new roof — Exemptions by term of lease.— A landlord, who has covenanted to keep demised premises in a tenantable condition and who subsequently, and during the term, puts a new roof on the building, is liable to a tenant of the top floor whose flat is, owing to the negligence of the landlord, his servants or agents, damaged by large quantities of rain water which ran through the roof while the change was being made. The landlord is not exempted from liability for such damages by a clause in the lease, reading "The landlord shall not be liable for any damage caused by leakage of water or for any cause or event", as the leakage here contemplated must be deemed to refer to such an one as might result from ordinary wear and tear, or from the carelessness of tenants, or from the sudden action of the elements. Randolph v. Feist, 650.

5. Overflow of water upon tenant beneath.— In an action where damages were sought for alleged negligence, it appeared that a bath-tub, directly over a part of the floor of the plaintiffs, was found in the morning full of water, that the faucet was turned on, that there was some water on the floor of the bathroom, that the ceiling of the plaintiffs' room had fallen down and that the walls were soaked with water, which was also dripping from the ceiling. Although the bathroom was under the control of the defendants, they showed that it was never used for bathing purposes, that no one ever went into it, except the partners and their stockman, that no one could go into it, unless some of these persons saw him, that they had seen no one go into it, and had not themselves turned on the faucet. They

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also showed that a plumber, in no manner an agent of the defendants, had been in the bathroom on the day before the overflow. Held, that, while the plaintiffs had clearly established a *prima facie* case, the court would not interfere with the decision of the court below, made upon the whole case, that the plaintiffs were not entitled to recover. Wiley v. Bondy, 658.

6. Care of an employer for the outer garments of its employees.— An employer exercises sufficient care in guarding the outer garments of its employees where it furnishes a wardrobe, situated in a locked inclosure and accessible, at stated times only, by a single door near which stands the desk of an employee, whose duty it is to remain at that place during the entire day and to see that none but the employees enter the locked inclosure; and where under such circumstances an employee loses his overcoat, he cannot recover its value of the employer upon the ground that it has been negligent, or that it has failed to perform any duty which it owed to the employee. Cantancarito v. Siegel-Cooper Co., 664.

7. Nonsuit — Opinion of lay witness.— Where the defendant has failed to make the contributory negligence of the plaintiff a ground for the dismissal of the complaint in an action based upon negligence, and this defect might have been supplied by the plaintiff had his attention been called to it on the trial, the court will refuse to consider the objection when made for the first time on appeal. Upon the trial of such an action, it appeared that the plaintiff, a bricklayer who had just been discharged from further work upon a building, was injured by a brick which fell from a scaffold. He was permitted to testify, under objection, among other things, "But I tell you, your honor, my head will never be the same." Held, that as the witness was not an expert, he was incompetent to express such an opinion. Pfau v. Alteria, 693.

8. Order of arrest — Execution against the person.— The nature of an action, for damages for personal injuries caused by the alleged negligence of an owner of real property in not keeping the ropes of a dumbwaiter in repair and also charging his servants with negligence in the matter, is not such as to justify an order of arrest, and where no such order has been made in the action, an execution against the person is not authorized by the provisions of section 1487 of the Code of Civil Procedure. Lasche v. Dearing, 722.

See **Costs.**
Innkeepers.
Landlord and Tenant.

NEGOTIABLE INSTRUMENTS.

1. Right of indorser sued to pay the holder and continue the action. — An indorser has a right to pay the holder of a note, take an assignment of the cause of action and continue, without being substituted therein as plaintiff, in an action begun by the holder against the parties to the instrument. Oneida County Bank v. Lewis, 34.

2. Judgment discharging joint debtor.— The entry of judgment against one of the makers of a firm note is a bar to a subsequent judgment against another maker. Id.

3. Indorsement by maker — Recovery against prior indorser.— A maker of a joint note who has indorsed it after the indorser, may, after its protest and after his payment of it to the holder, recover of the indorser in an action brought by the holder and which the maker is continuing for his own benefit, as the presumption is that his liability as indorser is precedent to that of the indorser against whom he seeks to recover. Id.

4. Failure of the holder to present promptly as discharging the drawer.— The failure of the holder of a check, drawn upon a local bank, to present it for payment during the business hours of the next regular day after its receipt, discharges the drawer, upon the subsequent failure of the bank, to the extent of the loss which he sustained by the failure to make prompt presentment. Murphy v. Levy, 147.

5. Drawer's subsequent promise to pay must be made with knowl-

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edge of dishonor. — A subsequent promise of the drawer, that he would make the check good to the holder, is not available, unless when he made it, the drawer had full knowledge that the check had not been duly presented and that it had been dishonored. Such knowledge, in the drawer, may be inferred from the circumstances. Id.

6. Consideration.— When such a promise has a sufficient consideration. Id.

7. Joint obligation — Counterclaim.— A note in the form:

"April 10, 1894. One day from date for value received, we promise to pay A. J. Miller, or bearer, one hundred and fifty-three dollars, with int.

"LEVI CROUNSE,
"EMMA CROUNSE."

is a joint obligation and cannot be made the subject of a counterclaim, upon the part of the estate of the deceased payee, as against the individual claim of one of the makers against the estate. Matter of Miller, 319.

8. Principal and surety — A change in collateral security, not prejudicial to indorsers, made without their knowledge or consent.— The act of the assignee of an indorsed note in releasing, before the note became due, chattel mortgage security given to her assignor by the makers of the note and assigned to her, and in taking, in lieu thereof, a new chattel mortgage upon the same property and upon the same terms, can afford no defense to the same indorsers of a renewal note who, when they indorsed it, were ignorant of the change which had been made in the chattel mortgages as, in the absence of proof of any damage to them, the court cannot assume that they have been prejudiced by the change. Keeler v. Hollweg, 415.

9. Failure of a complaint to allege delivery by the maker of a note, to her own order.— A complaint, by the receivers of a bank, alleged that a note was made by the defendant, Julia M. Clyde, to her own order, that the defendant Robert J. Clyde indorsed it and that, as thus indorsed, it was delivered to the bank for value, but the complaint did not state by whom it was so delivered. Held, on demurrer, that the complaint was sufficient, although it did not allege that Julia M. Clyde ever delivered or negotiated the note, as the allegation of the making of the note included the idea of a delivery. Odell v. Clyde, 734.

See **Banks.**
Bonds.
Pleading.
Ships and Shipping.

NEW TRIAL.

See **Appeal.**
Pleading.

NOTARY PUBLIC.

See **Contempt.**

NUISANCE.

Operation of the plant of a steam company.— Proof that, when the wind is in a certain quarter, cinders and soot from the smokestack of the building of a steam company fall upon the premises of a neighboring owner, that the occupants of these premises are somewhat disturbed by noises made by the iron shutters of the furnace of the steam company, and by the unloading of its coal, that foul odors are produced to some extent by the steam company's pouring water on heated ashes, and that more or less heat comes from its boilers, does not sufficiently indicate that the steam company is maintaining a nuisance, nor entitle the neighboring owner to maintain an action for an injunction restraining the steam company from carrying on a business in itself lawful. Farrell v. New York Steam Co., 726.

PARTIES.

1. Defects appearing on the face of the complaint — Demurrer.— Where a defect of necessary parties appears upon the face of the complaint in an action, the defect is waived unless the objection is taken by demurrer. Kaffeman v. Stern, 599.

2. Right to sue — The defendant cannot inquire into the terms of

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the plaintiff's assignment.— Where a party sues under an assignment of a cause of action, which is valid as against his assignor, the defendant has no legal interest to inquire whether the transfer was an actual sale, or merely colorable, or whether there was any consideration paid therefor, or what was the arrangement or understanding between the assignor and assignee respecting the ultimate disposition of the proceeds of the recovery. Linden v. Brustein, 655.

See Will.

PARTITION.

Intention of testator and owner of the fee that the lands should be held — Intervention of an express trust.— The will of a testatrix provided that "When my youngest grandchild becomes of age, I do give, devise and bequeath all the rest and residue of my estate, both real and personal (which residue included certain premises here sought to be partitioned), unto my seven grandchildren, to be divided between them equally, share and share alike. I do order my executor or executrix, hereinafter named, to pay unto Jennie Buhl, Freda Buhl and Dora Buhl, three of the children of my deceased daughter, Helene Buhl, formerly Bornhagen, each the sum of $5 weekly until my youngest grandchild shall become of age." This grandchild was aged thirteen. Held, that an action to partition the residuary estate could not be maintained, both because it was the expressed intention of the testatrix to postpone a division until the youngest grandchild became of age, and also because the provision relative to the Buhl children created an express trust, whose purpose would be defeated if the court sanctioned a partition at the present time. Sicker v. Sicker, 737.

See Estoppel.
Will.

PATENTS.

1. Action on the case for conspiracy — Fraud in the issue of a foreign patent — While the foreign decision stands, it cannot be reviewed collaterally — Measure of damages.— The complaint in an action on the case for a conspiracy, among other things, alleged that the defendants had conspired to appropriate an invention which the plaintiffs had made, that, upon an application made by both parties to procure a patent in the Dominion of Canada, an arbitration was had under its laws and that the defendants then succeeded by perjury and by subornation of perjury and secured the patent; that they had since manufactured under it to the great damage of the plaintiffs and that the latter had no other or adequate remedy for the wrong. The complaint failed to set out either the patent statutes of Canada or their substance. The defendants demurred. Held, that the demurrer must be sustained. That the gist of such an action was the damages already sustained, and that, to that end, the plaintiffs must show that they were entitled to have had the patent issued to them in Canada. That, in the absence of proof of the Canadian statutes, the court could not assume that those officials had no power to revoke the patent for a conspiracy, involving fraud and perjury, and issue it to the plaintiffs; that such a question involved a rehearing of the matters decided by the Canadian arbitrators, that their decision was in the nature of a judgment and that, while it stood, it could not be reviewed collaterally through the medium of the present action. Silverman v. Doran, 96.

2. License fees must be paid by licensors who use a patent.— Licensors cannot use a patent and refuse to pay the license fees provided for by the contract of license. Kaffeman v. Stern, 599.

PAYMENT.

Proof.— Where proof of payment, denied by the creditor, rests upon the evidence of the debtor and his clerk that payment was made to the creditor's agent, a finding of payment will be reversed where a receipt given to the debtor is not produced by him, nor its absence satisfactorily explained, nor its last custodian produced. Miller v. Smith, 648.

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PENAL CODE.

§ 443. People v. Lindenborn, 426.

PLEADING.

1. Services — Denial upon information and belief.— A denial, upon information and belief, is proper in an action for services and particularly, in a case, where the claim is made that the defendant was not in a suitable mental condition to have made the contract claimed by the plaintiff. Hensberry v. Clark, 37.

2. Discontinuance of an action — Consideration.— An answer, interposed to an action for goods sold, which alleges that, subsequent to its commencement, the plaintiff agreed to discontinue it upon the defendant's promise to pay the debt in weekly installments and, until it was paid, to purchase from the plaintiff alone all goods required in the defendant's business and which the plaintiff sold, presents, when accompanied by allegations of the defendant's willingness to perform and the plaintiff's refusal, a perfect defense to the action. Roth v. Phillips, 240.

3. Action for rent and a holding over — When it sufficiently appears to which cause of action a separate defense is applicable. — The complaint in an action alleged a cause of action for the rent of the last month of a yearly letting expiring October 1, and, separately, a holding over after 12 o'clock, noon, of October 1. The answer contained a general denial and, separately, a defense that the plaintiff took possession before noon October 1. Held, that the latter defense clearly referred to the second cause of action and that an order, that the defendant make his answer more definite and certain so that it might show to which cause of action his separate defense referred, was erroneous. Kucher v. Carrl, 250.

4. Action for rent — Denial of an allegation of nonpayment as affecting the right to open and close — That right is substantial.— Allegations, contained in the complaint in an action to recover rent, to the effect that the defendant has neglected and refused to pay rent for three months and that there is due the plaintiff a sum stated, are material to the cause of action and, when denied by the answer, entitle the plaintiff to the affirmative of the issue and require a new trial where the important right to open and close has been denied him. Trenkmann v. Schneider, 336.

5. Where a complaint charges fraud, there can be no recovery on contract — Proof of fraud.—Where the complaint in an action to recover moneys, alleges them to have been obtained from the plaintiff by the defendant through fraudulent representations, it is the duty of the court, upon finding that no fraud has been committed, to dismiss the complaint; and it has no power to render a judgment in favor of the plaintiff for the amount claimed as "for moneys loaned." An allegation of fraud in contracting a liability is not sustained by mere proof of a contract and its breach. Kress v. Woehrle, 472.

6. General denial — Want of consideration in a note.— *Semble*, that under a defense of a general denial, interposed to an action on a promissory note, a want of consideration cannot be proved, and that such a defense must be specifically pleaded. Manhattan Brass Co. v. Gillman, 598.

See **Corporations.**
Costs.
Duress.
Election of Remedies.
Landlord and Tenant.
Libel.
Municipal Corporations.
Negotiable Instruments.
Patents.
Service.
Trade-mark.

PLEDGE.

See **Corporations.**

PREFERENCE.

See **Calendar.**

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PRINCIPAL AND AGENT.

See **Agency.**

PRINCIPAL AND SURETY.

When not exonerated.— A mortgagor, standing as surety, is not exonerated by the fact that the creditor permitted the principal to resume possession of securities which he had deposited with the creditor, where it appears that the principal acquired such possession through an accomplice and by fraud and against or without the consent of the creditor. Sternback v. Friedman, 173.

See **Lease.**
Negotiable Instruments.
Undertaking.

PROBATE.

See **Will.**

POOR.

Contest as to settlement of a poor person — Service of notices.— The provisions of the Poor Law (Laws of 1896, chap. 225, § 43), in regard to the time within which notices, to be given by towns contesting the settlement of a poor person, must be served are mandatory and a failure to comply with the statute must result in the defeat of the town so failing. Matter of Merville, 398.

PROMISE.

Contracts — To pay when able.— Proof that a debtor promised her creditor that she would "pay her more just as quick as she could," and that she (the debtor) "thought that she would pay her (the creditor) the balance monthly," does not tend to establish a promise to pay when able — rendering it a condition precedent, to a recovery upon the promise, that affirmative proof of an ability to pay be shown. Denehey v. McCloud, 248.

See **Statute of Frauds.**

PUBLICATION.

See **Service.**

RAILROADS.

1. Construction of a reorganization agreement — Modifications of plan.— A reorganization committee of the insolvent Union Pacific Railway Company, was, by an agreement with the share and security holders, given unlimited powers in the matter, subject, however, to the proviso that the new securities to be issued should not exceed $100,000,000 and that no modification of a plan, proposed as of October 15, 1895, should be made unless a notice thereof should be advertised in a certain manner, and also lodged with certain named depositaries. On January 26, 1897, the committee issued a mere written announcement to the effect that, apparently, no material modification of the plan would be necessary except that, for reasons suggested, it might be necessary to limit the issue of 4 per cent. first-mortgage bonds to $75,000,000, instead of $100,000,000, as originally proposed for reorganization purposes," reserving the balance, under careful restrictions, for the future needs of the reorganized company, thus materially enhancing the standing and value of both the bonds and shares of the new company." A company was organized; it executed a first mortgage of $100,000,000 to secure bonds; it has issued $71,000,000 worth of bonds for reorganization purposes and proposes to issue about $90,000,000 in all. On June 25, 1897, the committee published a statement declaring "operative the plan of reorganization, dated October 15, 1895, with the modifications heretofore published." A stockholder brought this action to restrain the committee from issuing bonds for reorganization purposes to an extent greater than $75,000,000, claiming that he had paid the assessment, levied upon his stock, in reliance upon the written announcement of January 26, 1897. Held, that the action could not be maintained. That the announcement of January 26, 1897, was not designed to be an alteration of the plan, was not in the form required, was not published or deposited in the manner prescribed and that the committee had power to issue bonds up to the full amount of $100,000,000. That the statement of June 25, 1897, declaring the original plan operative "with the modifications heretofore published," referred only to modifica-

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tions which had been published and deposited in full compliance with the terms of the agreement. Barnard v. Fitzgerald, 181.

2. When organized before 1874 they may contract for mutual use of their tracks without obtaining the consents required, since 1874, by the Constitution — Effect of Laws of 1839, chap. 218.— Street surface railroad corporations, incorporated before 1874 and since operated by themselves or lessees have a right, under section 78 of the Railroad Law of 1890, as amended (the same constituting a substantial re-enactment of chapter 218 of the Laws of 1839, not affected by the repeal of the act of 1839 itself) to contract with another street railroad corporation "for the use of their respective roads and routes or any part thereof" without first obtaining the consents required by the Constitutional Amendment of 1874 and by the Constitution of 1894, as those provisions were designed to act prospectively only and cannot divest a right which had already vested under the act of 1839, as re-enacted in the Railroad Law. Roddy v. Brooklyn Heights Railroad Co., 373.

3. Action in equity against elevated roads — Measure of damages where the plaintiff parts with his title pending the action.— Pending an ordinary abutter's action in equity against elevated railroads in which damages to rental value were claimed as an incident, the plaintiff parted with his title and the action was thereafter tried, upon the single issue of rental damages, before a jury at a trial term, to whose calendar it had been transferred on motion of the defendants. This was the only trial and disposition of the action. Held, that as equity had once acquired jurisdiction of the action it retained it, notwithstanding the jury trial, and that hence the plaintiff was not limited, by the rule of common law actions, to the recovery of such rental damages as he had sustained within six years prior to the commencement of the action, but might recover such damages up to the time when he sold the property. Cameron v. New York Elevated Railroad Co., 590.

See **Carriers.**
Negligence.

RECEIVER.

See **Banks.**

REFEREE.

Removal for bias.— A referee's report, made in an action to which the city of New York is a party, will not be set aside upon mere proof that the referee, an attorney well known to have had great experience and knowledge of the laws relative to the city and who had frequently been retained by it as counsel, had, during the pendency of the reference, been retained as special counsel for it in certain cases wholly unrelated to the one referred and that he had also been retained in another city case before the reference was directed, as the court cannot, in the absence of proof, assume that his action as referee will be affected by such retainers. Fortunato v. Mayor, 82.

See **Fees.**

RELIGIOUS CORPORATIONS.

See **Will.**

REPLEVIN.

1. Former adjudication. — A dismissal of an action of replevin, "for a failure to place on calendar," is not "a final judgment" within the meaning of section 1691 of the Code of Civil Procedure and does not bar a second action of replevin for the same cause of action. Porges v. Cohen, 703.

2. Demand, where possession is rightful.— Where possession of chattels has been obtained rightfully, a demand, before action brought, must be alleged and proved, and a failure in this regard justifies a reversal of the judgment. Id.

See **Sheriffs.**

RESCISSION.

See **Building and Loan Associations.**

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RESTITUTION.

District Courts — Notice.— An application for the restitution of money, paid upon a judgment of a District Court of New York city, subsequently reversed, must be made on six days' notice. Code Civ. Pro., § 3058. Darcey v. Steger, 145.

RULES.

Action on a joint contract — Recovery against one defendant.— The common-law rule, that the plaintiff must fail in an action upon an alleged joint contract unless he establishes the joint liability of all the defendants, is not the rule in the state of New York since the enactment of section 274 of the Code of Procedure and section 1204 of the Code of Civil Procedure. Knickerbocker Ice Co. v. Theiss, 625.

SALE.

Evidence of a right to return defective goods.— Proof that some of the goods sold were returned to and were accepted by vendors renders it proper, in an action for the price, to submit to the jury the question whether there was not, as the vendees alleged, an agreement that they were to have the privilege of examining and from time to time returning, defective goods. Vietor v. Nichol, 115.

SALE.

See **Accord and Satisfaction.**

SECURITY FOR COSTS.

See **Motions and Orders.**

SERVICE.

1. **Order to examine adverse party — Void, unless witness' fees are paid — Vacation.**— The service, in an action, of an order for the examination, under section 873 of the Code of Civil Procedure of a defendant as an adverse party, when not accompanied by the payment of legal fees, is a nullity and entitles the defendant to move, upon the return day of the order, for its vacation. Bradley & Currier Co. v. Harrison, 241.

2. **Publication of summons — Filing papers on order.**— Before the summons can be published against a domestic corporation, the summons, complaint, order of publication and affidavits must have been duly filed (Code of Civil Procedure, § 442), and, where the order alone has been filed before publication, all proceedings under it must be set aside. Whiton v. Morning Journal Association, 299.

3. **City Court of New York — Service, as of course, of an amended answer, after a reply.**— The plaintiff, in an action in the City Court of New York, served an amended complaint on May 7; on May 15, the defendant served an answer to the same, setting up a counterclaim; on June 1, the plaintiff served a reply by mail, and on June 12 the defendant served an amended answer, as of course. Held, that the amended answer was in time as the defendant had twelve days to serve it after the service, by mail, of the reply. Seaman v. McClosky, 445.

See **Habeas Corpus.**
Justice's Court.
Poor.

SERVICES.

See **Attorneys.**
Contract.
Pleading.

SET-OFF.

A joint liability cannot be set off against an individual one — Waiver.— The mere admission, without objection, upon a judicial settlement, of a joint note of two persons sought to be set off by the administratrix against the liability of her intestate to one of them, does not establish the counterclaim and it remains the duty of the court to decide the question according to the established law that such a set-off is not permissible. Matter of Miller, 511.

SEVERANCE.

Severing an action against joint debtors.— Section 456 of the Code of

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Civil Procedure, relative to severing an action where only a part of the defendants have been served, does not apply to defendants whose liability is joint. Oneida County Bank v. Lewis, 34.

See Bar.

SHERIFFS.

Right to substitute his indemnitors against a wrongful levy.—The provisions of section 1421 of the Code of Civil Procedure entitle a sheriff, against whom an action of replevin has been brought to recover property alleged to have been wrongfully levied upon by him under an execution, to procure the substitution, in his place and stead, of his indemnitors as defendants in the action. Terhune v. Dunn, 600.

SHIPS AND SHIPPING.

1. Master's draft pledging his "owners"—Law governing the construction of the contract—Liability of a fractional owner of the vessel—Dingley Act—Advances unnecessary to the vessel—Liability of an executor as joint tenant of the estate of his testator. —In an action brought on a master's draft, it appeared that the defendant, a resident of the state of New York, was one of three executors who, in the right of their testator, owned one thirty-second of an American brig. After the death of the testator, the defendant, a shipping merchant, consigned the brig to the plaintiff, a merchant of Barbadoes, W. I. The draft pledged the "vessel, her freight and owners," and was payable ten days after the vessel arrived at her port of discharge in Europe. It was given by the master, in part at least, for advances not necessary to the brig, and which the plaintiff made without investigation as to their necessity. Before the time for the payment of the draft had arrived, the brig was sold in her foreign port of discharge for moneys raised on bottomry, she having, while on her voyage across the Atlantic, put into Bermuda in distress. Upon the trial of the action, the question, whether the sale of the brig did not determine all liability upon the draft, was not raised nor decided. The complaint charged the defendant individually as an "owner," and this allegation was denied. The allegation of individual ownership was not proved, but the defendant did not move to dismiss the complaint, because of a variance between the complaint and the proof. The Dingley Act of June 26, 1884 (Supp. R. S. U. S., vol. 1, p. 443, § 18), provides: "That the individual liability of a ship owner, shall be limited to the proportion of any or all debts or liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending." The defendant did not show the value of the brig nor that of his interest in it, or show whether or not there were other claims against it. Held, that as the power of the master, while in a foreign port, to bind his owners personally could only arise from their express instructions or be implied from the law of the country of the brig and her owners, the contract was to be construed according to the law of New York, as affected by the Dingley Act, and not by the law of Barbadoes, British possession, where the common law made a part owner liable, *in solido*, for debts lawfully contracted by the master. That, under the Dingley Act, the plaintiff was entitled to recover of the defendant to the extent only of those advances which were actually necessary to the brig, and could recover these upon the basis only of one thirty-second of the vessel, that being the proportion of all her proven debts or liabilities which his individual share of her, as a joint tenant with the other executors, bore to the whole. Hanschell v. Swan, 304.

2. Dingley Act—A part owner may limit his liability.— A consideration of the method by which a part owner may, under the second clause of section 18 of the Dingley Act, limit his liability, for the debts of a vessel, to the value of his fractional ownership therein. Id.

SLANDER.

See Libel.

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SPECIFIC PERFORMANCE.

Oral promise of a testator to provide for one as if she were his child and he had died intestate — Trust — Failure of proof.—An oral promise by a testator that, if the promisee would assume his name and live with him as his daughter until her marriage, he would care for her in all respects as if she were his own child, and would give and make over to her the same proportion of all his property, real and personal, as she would inherit by law were she his own daughter and he to die intestate, is, when followed by full performance, operative and imposes upon the property of the testator a trust, enforcible in equity against his devisees and heirs-at-law. Specific performance must, however, be refused where the claimant fails to establish, by clear and convincing proof, a contract definite and certain in every essential. Wilson v. Heath, 714.

STATUTE OF FRAUDS.

Original promises — Consideration.— A complaint which states that, after a dispute had arisen between Theresa Erb and the plaintiff, concerning a contract between them, they made a settlement and that a part of this was a parol promise, upon the part of the defendant, to pay a claim which a subcontractor had made against the plaintiff, affords in itself no ground for a recovery upon this latter claim as constituting an original undertaking upon the part of the defendant to pay the debt of a third person and, in the absence of any evidence showing that any benefit or advantage moved to the defendant, or that he was under any duty to pay the claim, a dismissal of the complaint upon the merits is proper. Perry v. Erb, 105.

STATUTE OF LIMITATIONS.

Acknowledgment of debt.—A letter written to a creditor by a debtor in which he says, "I regret to say that my neglect in not responding to your statement of account was owing to my not having disposed of but few of your goods (and those as samples) as it was nearly two years before I placed the first plant, but now that I have got the ball rolling, am in hopes to do good business in the future, that is, if Inman who is now over there, don't reap the benefit of the trade that took me three years to establish," when preceded by a statement of account mailed by the creditor to the debtor, constitutes an acknowledgment of the debt sufficient to remove from it the bar of the Statute of Limitations. Wright v. Parmenter, 629.

See **Criminal Law.**

STATUTES.

Repeal — A law inadvertently included in a repealing schedule.— A law, inadvertently included in a schedule of laws declared to be repealed by a general act covering the subject of such laws, is not to be deemed to have been legally repealed. McKee Land & Improvement Co. v. Swikehard, 21.

See **Banks.**
Descent.
Taxes.

STAY.

Foreclosure — Stay to subsequent purchasers, appellants in the Court of Appeals not liable for a deficiency and who have surrendered possession to the mortgagee — Terms, when the stay may benefit a party liable for a deficiency — Power of a judge out of court.— Purchasers, subsequent to a mortgage and not liable for a deficiency, who have prior to a judgment of foreclosure surrendered possession of the premises to the mortgagee, are entitled to a stay, pending their appeal in good faith to the Court of Appeals from an affirmance of the judgment by the Appellate Division, upon the same terms as a party in possession who appeals; and as they have, by their surrender to the mortgagee of possession, in effect, given the mortgagee all the security which can be demanded of them under section 1331 of the Code of Civil Procedure as amended in 1897, this consisting in securing the mortgagee against waste and for the benefit of the use of the premises, they need

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give no further security as a condition of the stay. As a stay must, however, inure to the benefit of all parties and as a defendant liable for a deficiency might, by collusion with a defendant not so liable and who had appealed first, secure the benefit of the stay without giving the statutory security, the court directed that, in case a defendant, against whom a judgment for a deficiency had been rendered in the action, should subsequently appeal, the stay granted to the subsequent purchasers should be vacated, to the end that an order for a stay might be made which would be just to all parties under the circumstances. A judge out of court may grant such a stay under the provisions of section 775 of the Code of Civil Procedure. Mutual Life Insurance Co. v. Robinson, 563.

STENOGRAPHERS.

See Fees.

STIPULATION.

It cannot be withdrawn on the trial.— A written stipulation of the defendant, although made in an action on a contract before the answer was amended, admitting the making of the contract, part performance by the plaintiff as alleged in the complaint, and nonpayment by the defendant of certain required monthly installments, cannot be withdrawn upon the trial. Penniman v. La Grange, 653.

SUMMARY PROCEEDINGS.

1. Demand of rent by mail.— Where the only demand of rent, made by a landlord of his tenants, consists in the mere mailing to them, by his agent, of a bill stating in detail the amount due, and he has not served upon them the alternative three days' notice in writing prescribed by statute, he has not sufficiently complied with the requirements of subdivision 2 of section 2231 of the Code of Civil Procedure to procure the dispossession of the tenants, who hold over. Zinsser v. Herrman, 645.

2. Forcible detainer — Petition — Jurisdiction.— An allegation contained in the petition of a person seeking to regain possession of premises from which, as he alleged, he has been forcibly dispossessed, that, when so evicted, he was in the peaceable possession of the said premises, a second floor, "by virtue of a certain arrangement or agreement made and entered into between himself and Julia Ross as lessee of said entire premises (of which the floor occupied by your petitioner as aforesaid forms a part) by the terms of which agreement your petitioner duly became entitled to and went into possession of the floor occupied by him as aforesaid," fails entirely to comply with the provisions of section 2235 of the Code of Civil Procedure requiring such a petition to describe the premises "and the interest therein of the petitioner;" the petition confers no jurisdiction of the subject-matter upon a District Court of the city of New York, and the objection that it does not confer jurisdiction may be made after answer. Potter v. New York City Baptist Mission Society, 671.

3. Forcible detainer —Petition — Jurisdiction. — An allegation contained in the petition of a person seeking to regain possession of premises from which, as she alleges, she has been forcibly dispossessed, that she is "a lessee of the premises * * * under an agreement made between her and the trustees of the said Tabernacle Baptist Church, by the terms of which your petitioner duly leased from the said Tabernacle Baptist Church the aforesaid premises, and by virtue of such agreement became entitled to and went into possession of said premises," is not a compliance with the provisions of section 2235 of the Code of Civil Procedure, which require such an applicant to present to the justice "a written petition * * * describing the premises * * * and the interest therein of the petitioner." A District Court of the city of New York acquires no jurisdiction of the subject-matter under such a petition and the defect is neither waived nor cured by the fact that the defendants plead to the merits before they objected to the jurisdiction of the court. Ross v. New York City Baptist Mission Society, 683.

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4. A tenant may show that his landlord's title has been defeated — Former adjudication. — A tenant cannot dispute the title of his landlord, but may show that that title has been defeated by some event which happened after the making of the lease. Where, however, a prior final order has been made in summary proceedings which, in effect, overruled the tenant's contention, then made, that his landlord's title, under a life tenant who had died, had passed to certain reversioners, the order is an adjudication that the relation of landlord and tenant still continues, and the tenant who, by payment, has stayed the issue of a warrant under the order, is precluded from renewing his contention, in a somewhat different form, in a subsequent proceeding taken by the landlord to dispossess him for nonpayment of the rent. Mulligan v. Cox, 695.

See **Appeal.**

SUNDAY.

See **Habeas Corpus.**

SUPPLEMENTARY PROCEEDINGS.

Fraudulent transfer through a third party.— Upon an examination in supplementary proceedings of a third party, who originally held an interest in an estate as trustee for the judgment debtor, the judgment creditor is entitled to show that a transfer of this interest, made by the judgment debtor to another person, was a mere subterfuge, was intended to delay creditors, that the trustee himself furnished the consideration and that it was inadequate. Matter of Millar v. Weaver, 254.

SUSPENSION OF POWER OF ALIENATION.

See **Will.**

TAXES.

1. Library corporation, using part of its building as a theatre, and applying the income to its corporate uses.— A corporation, organized to maintain a public library, reading-rooms, lectures and similar moral and intellectual agencies, having no capital stock nor any provision for the making or division of profits, supported by nominal membership fees, which uses a large part of its building for a theatre and public hall and devotes the resulting income solely to the purposes of its creation, is exempt from taxation under chapter 371 of the Laws of 1897. People ex rel. Young Men's Association v. Sayles, 1.

2. Assessment of an individual tract containing numbered full lots. The failure of assessors to comply with the statutory requirement (1 R. S., pt. 1, chap. 13, tit. 2, art. 2, § 12), that they designate, upon their roll, a subdivided tract by its name and each full lot by its number and that they set down opposite the number of each lot, in the second and third columns of the roll, respectively, the quantity of land in the lot liable to taxation and its valuation, is a fatal defect and a tax purchaser of one of the lots acquires no title by the sale. Bennett v. Kovarick, 73.

3. Failure of mortgagee to file a notice of his mortgage, in order to redeem from a tax sale.— Where an assessment for taxes is invalid, the rights of a mortgagee, under whom a plaintiff in ejectment claims, are not affected by his failure to file a notice and description of his mortgage in the manner provided by section 1 of chapter 280 of the Laws of 1870, a proceeding made requisite by the statute in order to redeem from a tax sale. Id.

4. Special statute as to effect of a county treasurer's deed — Repeal by implication.— Where an unrepealed special statute (Laws of 1873, chap. 620, § 9, as amended by Laws of 1875, chap. 80) declares that the deed of a particular county treasurer shall be merely presumptive evidence of the fact that the proceedings prior to the tax sale were regular, the provisions of the Tax Law (Laws of 1896, chap. 908, § 132) declaring such a deed to be conclusive evidence of that fact, are inapplicable, as the two statutes are independent, and a repeal by implication is not favored. Id.

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5. Taxation of the capital stock of corporations — Assessment of real estate.— Where commissioners of taxes allege, in their return to a writ of certiorari, issued to review the assessment of a railroad corporation, made under chapter 456 of the Laws of 1857, that they have accepted as true all the statements of fact contained in its verified inventory submitted to them, they must accept a statement of the inventory that the actual value of certain real estate, situated outside of the city and county, does not exceed an assessed valuation of it which has been made and is stated; and the commissioners cannot, subsequently, in assessing the capital of the corporation, include the real estate in their estimate at its cost. People ex rel. Delaware & Hudson Canal Co. v. Barker, 188.

6. Same.— A statement that the actual value of real estate, whose assessed valuation is stated to be unknown, does not exceed its cost, justifies its assessment at cost. Id.

7. Foreign real estate is not taxable.— Real estate, located outside the state of New York and held by a railroad corporation, is not a factor in assessing its capital and is to be entirely excluded from the assets. Id.

8. Taxation of the capital stock of corporations — Real estate may be deducted at its full value.— The law governing the taxation of the capital stock of corporations (Laws of 1857, chap. 456, § 3) requires tax commissioners, first, to value all the property of the corporation, real and personal, or both, and then to deduct the assessed valuation of its real estate in order to ascertain the taxable capital; but the commissioners, in making this deduction, are not limited by the assessed valuation of the real estate and may, if they deem proper, estimate it at its full value. People ex rel. New York Clearing House Building Co. v. Barker, 192.

9. When a building, adapted only to a particular use, may be assessed at cost.— Where the owner did not attempt to establish either a market or an actual value for a building, built for and adapted to a particular use, an estimate of it at its cost was sustained. Id.

10. Review of the action of tax commissioners.— Their action will not be reviewed unless it is capricious, arbitrary or unjust. Id.

11. An exemption to "hospitals, orphan asylums and all other charitable and benevolent corporations," etc., does not exempt a young men's christian association. — The provisions of the charter of the city of Brooklyn, exempting from the payment of water rates "The several hospitals, orphan asylums and all other charitable and benevolent corporations, associations and institutions," existing or thereafter established in the city, do not exempt the Brooklyn Young Men's Christian Association from such payment, as it is the purpose of the statute to exempt only such charitable and benevolent corporations as are similar in character to hospitals and orphan asylums. People ex rel. Brooklyn Young Men's Christian Association v. Willis, 545.

See **Certiorari.**
Ejectment.
Municipal Corporations.
Transfer Tax.

TESTAMENTARY CAPACITY.

See **Will.**

TOWNS.

See **Poor.**

TRADE-MARKS.

1. When a geographical designation cannot be made the subject of an exclusive use.— In an action brought to restrain the defendant from the use of the name "Brunswick" in the manufacture or sale of rock asphalt, it appeared that the plaintiff's asphalt was manufactured in cylindrical cakes at Eschershausen in the Duchy of Brunswick, Germany, and was sold under the brand "Brunswick G. & S. Germany," while the defendant's asphalt was manufactured

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in the city of New York upon a basis of 80 per cent. of rock asphalt, which had been quarried from one of numerous similar deposits in or near Eschershausen. Held, that the complaint was properly dismissed. That where the great element of the value of the manufactured article consisted in the locality of the principal material of which the article was composed, the geographical designation of the locality from which that principal material was derived might be used by another dealer. That as a general rule a geographical designation could not become the subject of proprietary use as a trade-mark, but that courts would interfere where the use was deceptive as to the locality of the basic production, or where the value of the designation consisted in identifying the things sold as valuable because of the well-known quality of the thing manufactured. Gabriel v. Sicilian Asphalt Paving Co., 534.

2. Hostile use of initial adjectives qualifying colors.— On a motion for a preliminary injuction in an action, it appeared that, upon the dissolution of the partnership of the parties for the manufacture and sale of dry colors, the plaintiff bought the assets including, among other things, the trade names "Oriole Vermilion" and "Peerless Green" and that the defendant, who had subsequently embarked in the same manufacture, was using the terms "O. Vermilion" and "P. Green." Held, that even assuming the plaintiff's right to both adjectives, he could not prevent the defendant from using the initials instead of the name, as such a use was not calculated to deceive the public, or at least, so much of it as used its eyes and ears. Lavanburg v. Pfeiffer, 577.

3. Common products.— The terms, "Clinton Hematite Red" and "Metalic Clinton Paint," indicate a paint pigment made from hematite ore, found near the village of Clinton, New York, and cannot be exclusively appropriated as a trade-mark. Clinton Metalic Paint Co. v. New York Metalic Paint Co., 66.

4. Exclusiveness.— A trade-mark may be wholly exclusive or of a lesser degree of exclusiveness. Id.

5. Combinations of words, figures or symbols.— A combination of words and figures or symbols may constitute a trade-mark, although some or each of the parts standing alone would not do so, and could be used without infringement; and in such a case it is the entire combination and setting which makes the trade-mark. Id.

6. Barrels and boxes — Devices of them as labels. Actual barrels, boxes and the like cannot be appropriated for trade-marks, because of their particular size, style or shape; but this has reference only to the physical objects themselves, and not to pictures or devices of them made for labels or brands. Id.

7. Words indicating kind, etc. — Words or names which describe the product or ware to which they are applied, by indicating its kind, quality or ingredients, cannot be exclusively appropriated as trade-marks therefor; nor can words belonging to the common stock of words be so exclusively appropriated. Id.

8. Name of a place or country.— The name of a place or country cannot be exclusively appropriated for a trade-mark for a product or ware of such place or country, as against one offering for sale a similar product or ware of the same place or country, and is only good against one using it for a product or ware not of such place or country. If it be used arbitrarily or fancifully, it is only good against one using it in the same way, and not against one using it truthfully, namely, in its actual meaning. Id.

9. Intention — Fraud.— The intention of the defendant is not material on the question of granting relief by injunction against an infringement of a trade-mark and fraud is only material on the question of damages. Id.

TRANSFER TAX.

1. Payment of mortgages from personalty under the directions of a will.— A direction to executors, that they shall pay mortgages upon the real estate devised by the will of their testator does not authorize an appraiser, appointed under the Transfer Tax

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Law, to deduct the amount thus paid from the value of the personal property in order to determine the value of the succession to it; and this, notwithstanding the fact that the Real Property Law (Laws of 1896, chap. 547, § 215) expressly permits a testator to direct that mortgages upon his realty shall be paid from his personalty. Matter of Berry, 230.

2. Device to a foreign corporation, authorized to take and hold property in the state of New York. — A foreign corporation, although enabled by chapter 557 of the Laws of 1813 to take by devise and hold property in the state of New York, within existing statutory limitations, is, in the absence of any statutory exemption, taxable under chapter 399 of the Laws of 1892, upon the succession to a legacy under the will of a decedent who died in January, 1894. Matter of Wolfe, 439.

TRIAL.

1. Right of a party to withdraw his request for the direction of a verdict.— *Semble,* that, although both parties request a verdict in their favor, and the court thereupon directs a verdict for the defendant, the plaintiff may, if there is any question of fact, withdraw his request and ask that the case be submitted to the jury. Flicker v. Graner, 112.

2. Conduct of defendants which admits that there are questions for the jury.— Where the defendants do not move to dismiss, nor ask for the direction of a verdict, or except to the charge made, or request that any charge be made, there is an unequivocal concession that there are questions of fact for the jury. Kraetzer v. Thomas, 329.

See **Negligence.**
Pleading.
Stipulation.

TRUSTEES.

1. Not charged with proper investments which result unprofitably through a general depression. — Where a trustee loans, in good faith, trust funds on mortgages upon property to the extent of only two-thirds of its value and the investment thereafter pays 6 per cent. interest for several years, his estate will not, at the instance of his successor, be charged with the investments merely because the lands themselves, the same having been bid in upon sales had upon the foreclosure of the mortgages, have, since the death of the trustee, produced no income, it appearing that during all this period there has been a depression in the real estate market which has made it difficult to either rent or sell at fair prices. Atlantic Trust Co. v. Powell, 289.

2. Counterclaims — Advances of income, commissions on income, payments, etc.— Counterclaims for advances of income made to the beneficiaries by the deceased trustee and for commissions on income, not claimed by him in a brief account rendered to them, cannot be maintained. The estate of the trustee is, however, entitled to be allowed half commissions on the principal and also to reimbursements for payments which he made on the foreclosure of the mortgages for the expenses thereof, taxes, water rates and insurance, together with interest thereon. Id.

See **Trusts.**

TRUSTS.

1. Suspension of power of alienation — Rejection of void ulterior limitations — Vesting of remainders — Direct gift, with postponement of delivery.— By the second clause of a will of personal property a testator, having two sons, Nathan and Harrison Clark, gave to his grandson Harrison Clark, Jr., $20,000, to be held by trustees for his benefit until he reached the age of thirty years, when he became entitled to the principal. By the third clause the testator gave one-half of his residuary estate to his son Nathan absolutely and the other half to trustees. They were directed to hold their half during the joint lives of the son Harrison and his wife and for their benefit and, upon the death of the survivor, until the youngest of their children (four in number) who might survive them should

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attain the age of thirty years and thereupon the surviving children were to take equal shares. By the third clause he further directed that if his grandson Harrison Clark, Jr., died before reaching the age of thirty years, the principal of his share should be added to the trust which he had created for the benefit of his son Harrison, his wife and family. Held, that the trust in favor of Harrison Clark and his wife was void because it was not limited by two lives in being at the death of the testator; and that the trust in favor of the grandson Harrison Clark, Jr., was made void by the provision of the third clause that it should, in the event of his dying before the age of thirty years, be added to the trust created in favor of Harrison Clark, his wife and family. That, in view of the manifest intentions of the testator, the ulterior void limitations, contained in the third clause, could and should be cut off. That it should be held that the estate created by the third clause for the benefit of Harrison Clark and his wife, vested, upon the death of the testator, in their four children, subject to the life estate of their parents and subject to be defeated by the death of a child during the running of the life estate. That the provision for Harrison Clark, Jr., as made by the second clause, should be deemed a direct gift, with postponement of actual delivery until he reached the age of thirty years and that, in case he died before attaining that age, the principal would pass to his heirs. Clark v. Clark, 272.

2. Directions to testamentary trustees which take the fund out of the jurisdiction.— A testamentary direction to trustees to invest trust moneys "in first mortgage notes, secured on real estate in the city of Chicago, Ill.," is mandatory and must be followed, although it takes the trust funds beyond the jurisdiction of the court. Id.

3. Manner of investment.— In following a testamentary direction to trustees, "to invest said trust fund in first mortgage notes, or other first-class securities, which will bear as high a rate of interest as said trustees shall deem consistent with the safety of the investment," they must see that the securities are first-class, safe and proper for investment by trustees and should select from such securities those which bear the highest rate of interest. Id.

4. When trustees need not see to the application of a payment.— The responsibility of testamentary trustees, who are authorized to determine the part of a trust fund which they shall pay to the wife of the son of the settlor for her use and that of her children, ceases when they have determined upon and made the payment and they need not supervise its expenditure. Id.

5. Their discretion, in apportioning a fund, will not be reviewed unless abused.— Where testamentary trustees are given discretion to determine how much of the income of a trust shall be given to a husband and how much to his wife, for her use and that of her children, the court will not attempt to control the discretion exercised in the matter by the trustees, unless there has been an abuse. Id.

6. A stipendium established in Germany — Bequest to the chief magistrate of Berlin, as patron of a Latin school — Indefiniteness of beneficiaries — A trust shall not fail for want of a trustee.— A bequest to the chief magistrate of the city of Berlin, Germany, to establish, in a designated Latin school of which he is the patron, the Bonnell-Gutmann Stipendium, with directions that, after their separate amounts have been fixed, the stipendium shall be granted to graduates, among other things, "according to the free judgment * * * of the director or College of Professors of the said Latin school and according to the need of the applicants" is a valid disposition. The designation of the trustee, as chief magistrate, is sufficient and he may be regarded as a *locum tenens*. The trust is not void for indefiniteness as to the beneficiaries, as, in the event that the director and the college professors should differ in the matter of their selection, the chief magistrate would be justified in accepting the choice of the director or that of the professors. The refusal of a trustee to act is not material nor is it to be presumed; and the court will not assume that, should it occur, a foreign court would permit the trust to fail, but will assume that it would appoint a trustee. Kurzman v. Lowy, 380.

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7. Petition by a remainderman — Consent of the holders of particular estates to a sale — An existing express trust — Effect of a voluntary existing express trust. — A testatrix devised to trustees one equal share of her residuary real and personal estate "upon trust for my said son Joseph R. Peirson for his life, with remainder for Susan, his wife, for her life, with remainder for their children or child living to attain the age of twenty-one years, and if more than one, equally share and share alike as tenants in common. And in default of any such children or child then the said share so intended for the benefit of my said son Joseph Robert Peirson and his wife and their children or child shall be held by my said trustees for the benefit of my said daughter Julia Augusta Van Bergen and her husband or children or child as if the same were included in the share hereinafter provided for my said daughter and her husband and children or child." She devised another third for the benefit of her daughter Julia Augusta Van Bergen to the same trustees and upon the same conditions and the remaining third, for the benefit of another person, upon a similar trust; a disposition subsequently cut off by her and this share directed to take the same course as the other two shares. Her son and his wife and the husband of her daughter are living. In an action of partition brought by a remainderman, the son of Joseph R. Peirson. Held, that the will created a valid express trust to receive the rents and profits and apply them to the use of the beneficiaries named. That as three of the beneficiaries were living the trust still existed and hence the trustees, as holders of the particular estates, had no power to give the written consents to a sale in the action which are required, by section 1533 of the Code of Civil Procedure, to be given by such holders where an action of partition has been brought by a remainderman. It further appeared that after the will of the testatrix had been probated, her son and his wife, her daughter and her husband voluntarily conveyed to the same trustees all the property in question upon the same trusts as were created, or were attempted to be created, by the will, and that this instrument of conveyance clearly created a valid express trust to hold the premises, receive the rents and profits and apply them to the use of the same beneficiaries during life. Held, that as this trust, although voluntary, was still in existence and had never been revoked, it constituted an additional bar to a sale of the premises under section 1533 of the Code of Civil Procedure. Peirson v. Van Bergen, 547.

See **Executors and Administrators. Will.**

UNDERTAKING.

Order of arrest — Liability of sureties for the defendant's loss of earnings while in jail.—Sureties upon an undertaking, given in an action by the plaintiff to procure an order of arrest, are liable to the arrested defendant for his loss of earnings for forty-two days, during which period he was unjustly incarcerated by virtue of the order, as such a loss is a proper element of the damages which the defendant "might sustain by reason of the arrest," within the meaning of the undertaking. Spang v. Patterson, 536.

VETERANS.

See **New York City.**

VENUE.

Place of trial — Change for convenience of witnesses. — Where the cause of action arose, and the majority of the witnesses reside, in the county of Albany, the court may, for their convenience, properly change the place of trial to that county from the adjoining county of Rensselaer. Fielding v. Cohoes Masonic Temple Association, 52.

VERDICT.

See **Negligence. Trial.**

VILLAGES.

1. Failure to submit to a vote the establishment in a village of a lighting system — Effect upon con-

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demnation proceedings taken to acquire an existing system.—Where a general statute (Laws of 1894, chap. 680) provides that before a village board of water commissioners can establish a village lighting system, the question whether the village shall establish or acquire such a system must be submitted to the voters, the submission, at a village election, of the simple question whether the taxes authorized by the statute shall be levied and collected of the village affords no authority to the board to acquire by condemnation a lighting system which exists in the village and the proceedings in question are absolutely void. The distinction between the statute in question and chapter 181 of the Laws of 1875, considered and stated. Matter of Village of LeRoy, 53.

2. Waiver of statutory conditions — Estoppel — Rescission and restoration.— A village has no authority to waive a statutory condition precedent, that a popular vote must be taken upon the question whether the lighting system shall be established in the village; and hence is not, although part performance has been made by the owners of the lighting system acquired, estopped from moving, by its board of trustees, to set aside the condemnation proceedings, but, while it is entitled to rescind, it must also restore what it has received in the proceedings. Id.

See **Municipal Corporations.**

WAREHOUSEMAN.

See **Carriers.**

WILL.

1. A will cut in two parts, but by some one other than the testatrix — Revocation — Implied revocation.— The proponent of an alleged will presented for probate two separate sheets of paper, formerly constituting one sheet of legal cap, one of which contained the disposing part of a will and the other the signature of the testatrix and the attestation clause. Proof was made that the will was duly executed and no direct proof was given as to how the sheets became separated. A son of the scrivener of the will testified that, in his father's lifetime, he saw the sheet which contained the disposing part in his father's desk but that he did not see the other sheet. After the death of his father, and one year after the death of the testatrix, both parts were found in the desk and also a paper written by the scrivener and signed, but not executed in the manner required for the revocation of a will, by the testatrix, which purported to be her requests as to the disposition of her property after her death and which contained the recital, "Requests of Luania Cardot Ackels (the testatrix), for the division of her property, having given it all to Marvin and Frank Cardot." Slight additional evidence was given that she had disposed of all her property in her lifetime. Held, that the sheets were entitled to probate as a will. That there was no proof that the testatrix had revoked the will by cutting it apart herself, nor was there any by witnesses who saw such a revocation made by a third person at the request of the testatrix. That no revocation was to be implied from the alleged disposition by the testatrix of all her property in her lifetime, as this was not sufficiently proved, and, even if proved, should not prevent the beneficiary from proving the will, to the end that its effect might be thereafter determined. Matter of Ackels, 321.

2. Bequest to a town supervisor void for indefiniteness.— A bequest to the supervisor of a town and his successors in office of $5,000 in trust, "the interest or income only to be used in the support or relief of widows and fatherless and orphan children, in the town of Sherburne, as he, the said supervisor, may deem meet and proper," is void for indefiniteness. Matter of Botsford, 388.

3. When a void legacy in remainder passes to other remaindermen whose legacies will otherwise abate, rather than to the residuary legatees.— The fifth clause of the will of a testator bequeathed to his wife the income of $40,000 for life and, after her death, directed its disposition among various legatees, including the town supervisor aforesaid, but, through an error of the testator, these gifts, as stated in his will, amounted to the sum of $44,000. He further directed

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that the legacy to his wife should in no case abate. The will contained a residuary clause. Held, that the residuary legatees were not entitled to the void legacy of $5,000 to the town supervisor. That, as the mistake of the testator as to the total of his legacies would necessarily cause a deficit in the case of the other legatees, so much of the $5,000 as was necessary should be applied to their legacies to the end that his manifest intention, that they should receive full payment of the sums given to them, might be respected. Id.

4. **Testamentary capacity — Lucid interval of one suffering from the insanity of consumption.** — Although a testator may be suffering from the insanity of consumption, a progressive disease, a will, made by him during a lucid interval and which seems to be the work of a rational man who understood his position, the membership of his family and the extent of his property, will be sustained. Matter of Cornelius, 434.

5. **Corporations — Power to take under Laws of 1848, chap. 319.** — Where there is no proof that certain corporations, benefited by a will, were incorporated under chapter 319 of the Laws of 1848, the objection, that the bequests to them were, in violation of that statute, made within two months before the death of the testator, is not available. Id.

6. **An executor cannot procure, under Code of Civ. Pro., § 2624, a construction by a surrogate of a bequest of personalty.** — A mere executor and proponent of a will has not sufficient interest in the estate of his testator to entitle him to invoke the jurisdiction given to a surrogate by section 2624 of the Code of Civil Procedure, to determine the validity, construction or effect of a disposition of personal property contained in the will of a resident of the state of New York, executed within the state, when the disposition is expressly put in issue by a "party." Matter of Robertson, 451.

7. **Bequests of personalty to foreign religious corporations — Power to take is governed by the law of the domicile of the donee.** — Where boards of missions, incorporated in a foreign state, are forbidden by its statutes to take bequests under any will unless the will was made one calendar month before the decease of the testator, they cannot take bequests under a will of personal property, situated in this state, which was made by a resident testator twenty-six days before his death, and this, although such bequests would be valid under the laws of this state. Id.

8. **Equitable conversion — Executors' commissions on realty as personalty.** — A will by its second clause devised the testator's residuary estate to his executors in trust, gave them a power of sale to be exercised "at such time and for such consideration as they may deem proper" and, until exercised, directed them to hold, let, rent or mortgage the same, collect the rents, issues and profits and apply and dispose of the principal and income as thereinafter provided. The third clause created a trust in a specific sum, which amount had been made from the personalty. The fourth clause directed his executors and trustees to invest and reinvest three-eighths of his estate and apply its rents and income to the use of his widow for life or until remarriage and, in the latter event, "to assign, transfer and pay over two-thirds of the aforesaid three-eighths of my estate or the proceeds thereof, to her children Lillian and William equally, share and share alike." Similar trusts were then created for children of the testator by a former wife. The eighth clause permitted the trustees, in the case of any trust, to "retain any securities or property belonging to my estate, as an investment of the whole or any part of the principal of the trust." The eleventh clause authorized the trustees "to sell, lease or mortgage the whole or any part of the real estate that may come into their hands." Held, upon a consideration of the entire will, that it contained no mandatory power of sale and, therefore, worked no equitable conversion; and that consequently the executors were not entitled to have the unsold real estate regarded as personalty for the purpose of estimating their commissions. Matter of Hardenbrook, 538.

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9. Partition — Insufficient proof of the will of the deceased owner, drawn in a foreign country.— A stipulation showing that the person, a citizen of the state of New York, through whom all the parties to an action of partition claimed, died in a foreign country and left a writing, there made, which was duly deposited in a court of the foreign country where administration was had and that this paper, never proved or established as a will in the state of New York, had upon its face certain acknowledgments and witnesses, when not accompanied by any proof that the paper was executed and acknowledged according to the requirements of our Statute of Wills, affords no basis for a defense, interposed in the action, that this paper, a copy of which was annexed to the answer, governed, as a will, the disposition of the premises. Koppel v. Holm, 557.

10. Lapsed devise. — A devise, which lapses by the death of the devisee before that of the testatrix, does not become undisposed of realty, passing to the heirs, but goes to the residuary devisee. Adams v. Anderson, 705.

11. Contingent remainders — "Lawful heirs" — Trusts — Suspension of power of alienation — Limitation of a trust upon the life of a child unborn — Substitution of a second wife and her children — Disposition of rental and fee damages as between life tenant and remaindermen — Testamentary release to trustees — Parties.— A will devised the real estate of a testator to trustees for the benefit of his wife for life and, after her death, directed a sale by the trustees and the "net proceeds of said sale to divide into four equal parts or shares", and further directed them "to pay" these to his three children or those who represented their stocks, while, in the case of the fourth share given to his son Henry, the testator directed it to be held in trust solely for Henry's wife and children "until his youngest child shall have attained the age of twenty-one years," when the share was to be equally divided among the children of Henry. Held, that the remainders thus limited were contingent, that they did not vest until the death of the testator's wife and were then distributable to those members of the different classes who were then in existence. In the case of a son named James, who died unmarried and without issue before the testator, the will directed that, in case of the death of James before his mother, his share should pass "to his lawful heirs," Held, that as the gift was only of the proceeds of sale, "his lawful heirs" were those of his kindred or blood who took by the Statute of Distributions. It appeared that, when the will was made, the son Henry was married and had one child; that both his wife and child died before the testator; that Henry married again; that his second wife was with child when the testator died; that Henry had two other children before the testator's widow died and that he had still another child, born a year after her death. Held, that the children of the second wife of Henry were entitled to take and that the second wife was entitled to her support from the income of the trust. That the phrase "until his (Henry's) youngest child shall have attained the age of twenty-one years" must be taken to mean, until the youngest child of Henry, living at the time of the testator's death, had attained that age. That the true construction of the entire limitation was that it was dependent only upon the life of the testator's widow and the minority of that child, of Henry, who was conceived before but born after the testator's death; that, after the widow's use during life and after her death, the trust was limited for the use of Henry's second wife and her children, born or to be born during the existence of the trust, with remainder to such children, provided always that they were in existence when the trust terminated by the child of Henry, born a few months after the testator's death, reaching majority, or by the death of that child during minority. Rental damages caused to abutting property by elevated railroads pass, so far as they accrued before the death of a life beneficiary, to her personal representatives, but those accruing after her death, and any damages to the fee, go to the remaindermen. A provision in the will of a life beneficiary, reciting that as she herself has collected the rents of the trust estate, she releases the trustees from

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liability for rents not collected, does not release them from liability for rental damages, caused by elevated railroads, which neither she nor they collected. Where the personal representatives of a life beneficiary are necessary to a final determination of an action brought by trustees, they must be brought in and the trial must stand adjourned until they have had an opportunity to plead. Cogan v. McCabe, 739.

See **Estoppel.**
Partition.
Trusts.

WITNESS.

Impeachment.— Where, after the credibility of the plaintiff's assignor has been attacked by two witnesses, the defendant calls the assignor as his own witness, he cannot subsequently insist that he has been injured by the refusal of the court to permit him to swear a third witness in order to impeach the assignor. Linden v. Brustein, 655.

See **Fees.**
Liquor Tax Law.
Negligence.

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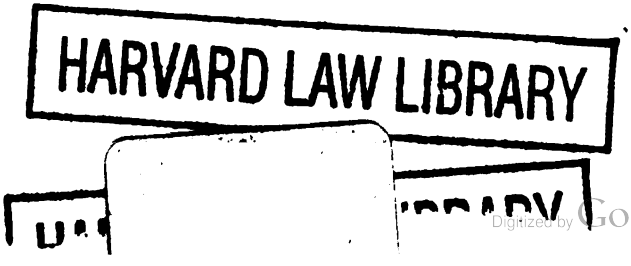
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